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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH V. ORLEANS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 509 F. 2d 197. The opinion and orders of the district court (App. B, *infra*) are not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered on January 13, 1975. A timely petition for rehearing was denied on April 2, 1975. On June 23, 1975, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and in-

cluding July 31, 1975. A further extension to and including August 30, 1975, was granted by Mr. Justice Marshall on July 23, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employee of a community action agency that receives funding under the Economic Opportunity Act of 1964 is an "employee of the Government" within the meaning of the Federal Tort Claims Act.

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2671:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

* * * * *

STATEMENT

1. Pursuant to Title II of the Economic Opportunity Act of 1964, 78 Stat. 516, as amended, 42 U.S.C. 2781 *et seq.*, the federal government, acting through the Community Services Administration (formerly the Office of Economic Opportunity), furnishes financial assistance for "community action programs," undertaken by "community action agencies." The Act defines a community action agency as a "State or political subdivision of a State * * * or * * * public or private nonprofit agency or organization which has been designated by a State or * * * political subdivision * * * which * * * is determined to be capable of planning, conducting, administering and evaluating a community action program * * *" (42 U.S.C. 2790(a)). In turn, "community action program" is defined as a program that provides "a range of services and activities having a measurable and poten-

tially major impact on causes of poverty in the community * * *'' (*ibid.*).

The Act places a variety of restrictions on the kind of organization that may receive funding as a community action agency. For example, guidelines are set down to ensure that the organization's governing board will be representative of the interests of the community to be served (42 U.S.C. 2791(b) and (c)); the organization is required to assume several broadly defined responsibilities in connection with the operation of its community action program (42 U.S.C. 2795(b)); it is required to observe administrative standards "which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this [Act]" (42 U.S.C. 2796(a)).

But the Act also puts substantial emphasis on local control over community action programs and on "maximum feasible participation of residents of the areas and members of the groups served" (42 U.S.C. 2781(a)(4)). The federal government is barred from establishing "binding national priorities" for the use of funds made available under the Act (42 U.S.C. 2808(e)). Instead, the governing board of each community action agency (which may not include any employee of the Community Services Administration; 45 C.F.R. 1015.735–19) retains authority "to appoint persons to senior staff positions, to determine major personnel, fiscal, and program policies, [and] to approve overall program plans and priorities" (42 U.S.C. 2791(e)).

2. The Warren-Trumbull Council for Economic Opportunity, Inc., is an Ohio community action agency authorized to receive federal funds under the Act (App. A, *infra,* pp. 1a, 6a).[1] Its community action program included the operation of the Westlawn Neighborhood Opportunity Center (App. A, *infra,* p. 1a). Respondent, a minor, was injured in an automobile accident while returning from an outing sponsored by Westlawn (App. A, *infra,* p. 1a). The driver of the automobile in which respondent was riding was another minor who also had attended the outing (see App. A, *infra,* pp. 1a–2a). Employees of the Council had arranged for respondent to ride in that car (*ibid.*).

3. Respondent, through his father, then brought this suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.,* alleging that "the agents of the United States of America in charge of [the Westlawn] outing were negligent in the organization and supervision of said outing * * *" (App. A, *infra,* p. 2a) and requesting $1,000,000 in damages (C.A. App. 4).[2] The United States moved for summary judgment on the ground that the Council is not an agency or instrumentality of the United States and therefore its employees are not "employees

[1] The Council is a nonprofit Ohio corporation that has been designated as a community action agency by the City of Warren, and the County of Trumbull, Ohio (App. B, *infra*, pp. 18a, 22a–24a).

[2] "C.A. App." refers to the appendix in the court of appeals. Respondent's father requested an additional $100,000 in damages (C.A. App. 4).

of the Government" within the purview of the Tort Claims Act. The district court granted the motion (App. B, *infra,* pp. 2a, 17a–21a).

The court of appeals reversed and remanded for trial. The court recognized that this Court in *Logue* v. *United States,* 412 U.S. 521, 531, had held (1) that the Tort Claims Act invokes the " 'traditional distinction between employees of the principal and employees of an independent contractor' " (App. A, *infra,* p. 9a) and (2) that, under that traditional distinction, "[o]nly if the principal has the right to supervise the 'physical performance' of the work of such employees do they become employees of the principal" (*ibid.*). The court of appeals further acknowledged (App. A, *infra,* p. 12a):

> The relationship between OEO and WTCEO meets a number of the criteria for establishing that WTCEO is an independent contractor. There was no showing that OEO controlled or supervised the physical performance of the work of employees of WTCEO and Westlawn. Moreover, the requirements imposed on these local agencies by statute and regulations are not concerned with the details of the day-to-day operations of the agencies or the programs which they carry on in the Warren-Trumbull County area. They are more in the nature of general instructions to be followed in order to assure that certain policies which Congress had adopted in establishing OEO are respected and adhered to.

The court nevertheless held that "resort to the traditional tests of the principal-contractor/employee

relationship" (App. A, *infra,* pp. 15a–16a) was inappropriate where the plaintiff was an intended beneficiary of a community action program. Reasoning that both the Tort Claims Act and the Economic Opportunity Act "were designed to remedy conditions which caused hardship and human suffering" (App. A, *infra,* p. 14a), the court concluded that Congress must have intended to make the government liable for any negligence of an employee of a community action agency that causes injury to an intended beneficiary who is "engaged in approved programs" (App. A, *infra,* p. 15a).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals departs from the principles set forth by this Court in *Logue* v. *United States,* 412 U.S. 521, and directly conflicts with the decision of the Eighth Circuit in *Vincent* v. *United States,* 513 F. 2d 1296, petition for a writ of certiorari pending, No. 75–60.[3] The question whether the government has assumed liability for the negligence of the employees of community action agencies is an important and recurring one that should be promptly resolved.

1. The Federal Tort Claims Act confers jurisdiction on the district courts to entertain civil actions for money damages for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *" (28 U.S.C. 1346(b)). The Act defines "[e]mployee of the government" as including

[3] We are not opposing the petition in *Vincent.*

officers and employees of "any federal agency" (28 U.S.C. 2671) but further defines "federal agency" as expressly not including "any contractor with the United States" (*ibid.*).

This Court in *Logue* v. *United States, supra,* in holding that the United States is not liable for the negligence of employees of jails with which the federal government contracts for the safekeeping of federal prisoners, recognized that "the 'contractor with the United States' language of § 2671 adopts the traditional distinction between employees of the principal and employees of an independent contractor with the principal, and * * * that the critical factor in making this determination is the authority of the principal to control the detailed physical performance of the contractor" (412 U.S. at 527–528).

A community action agency is an independent contractor under the test applied in *Logue.* As the court of appeals explicitly stated, "[t]here was no showing that OEO controlled or supervised the physical performance of the work of employees of WTCEO and Westlawn" (App. A, *infra,* p. 12a).[4] Since the federal

[4] The court of appeals nevertheless concluded that community action agencies do not fit within the traditional meaning of the term "contractors" because (1) many such agencies are entirely dependent upon the federal government for funds, (2) their federally funded programs must be approved by the federal government, which also often devises the program in the absence of local initiative, and (3) the federal government retains the power to dictate major personnel and operating decisions by threatening to cut off funds. See App. A, *infra,* pp. 12a–14a. But these factors do not distinguish community action agencies from many other government contractors that are similarly dependent upon federal contracts that must be performed in accordance with detailed specifications. The role of the Community Services Administration in overseeing the federally funded activities of community action agencies is confined to the traditional exercise by the government of the right to inspect or audit to determine whether, and to attempt to ensure that, federal funds are, and will be, spent in accordance with the congressional purpose.

government does not "control the detailed physical performance of" community action agencies, those agencies are not federal agencies, and their employees are not "employee[s] of the Government" within the meaning of the Tort Claims Act. The contrary decision of the court of appeals is inconsistent with this Court's decision in *Logue* and has no basis in the Tort Claims Act.[5]

2. The decision below also directly conflicts with the decision of the Eighth Circuit in *Vincent* v. *United States, supra.* In *Vincent,* a participant in an outing sponsored by a community action agency was injured while riding as a passenger in an automobile driven by the agency's employee. The injured participant brought suit against the United States under the Tort Claims Act, alleging that the community action agency was a federal agency and therefore that the driver was an "employee of the Government." The district court rejected these claims and dismissed the

[5] The lack of any statutory underpinning for the court of appeals' decision is further shown by the court's suggestion that the *Logue* test might be applicable where the plaintiff was "a member of the general public" (App. A, *infra,* p. 15a) but not where, as here, the plaintiff is a member of a class of intended beneficiaries under the Economic Opportunity Act. The court did not attempt to explain how any construction of the Tort Claims Act could make the question whether an individual is an "employee of the Government" turn on the identity of the plaintiff.

complaint. 383 F. Supp. 471 (E.D. Ark.).[6] The Eighth Circuit affirmed, and in doing so specifically declined to follow the decision of the Sixth Circuit in this case. 513 F. 2d at 1298.[7]

3. The conflict represented by *Vincent* and the decision below should be resolved in order to give appropriate guidance to the federal courts and forestall further litigation of the question of the scope of the government's liability with respect to the negligence of employees of community action agencies.[8] We are informed by the Community Services Administration that approximately 35 civil actions arising out of alleged negligence by employees of community action agencies, involving substantial claims, are presently pending against the United States. Each of those actions necessarily involves the question presented

[6] All other district courts that have considered the question in reported decisions have reached the same result. See, *e.g.*, *Hughes* v. *United States*, 383 F. Supp. 1071 (S.D. Iowa); *Prater* v. *United States*, 357 F. Supp. 1044 (N.D. Texas).

[7] The Fifth Circuit has similarly held that discharged employees of community action agencies are not discharged federal employees for purposes of the Due Process Clause. *Hines* v. *Cenla Community Action Committee, Inc.*, 474 F. 2d 1052; *Robles* v. *El Paso Community Action Agency*, 456 F. 2d 189. See, also, *United States* v. *Del Toro*, 513 F. 2d 656 (C.A. 2).

[8] The judgment in *Vincent* is final. The judgment below is interlocutory in the sense that the case has been remanded for further proceedings, but it is a final determination of the legal issue presented here, which will control future litigation in the Sixth Circuit. Accordingly, the nonfinality of the judgment below does not bar certiorari review. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3; *Land* v. *Dollar*, 330 U.S. 731, 734, n. 2.

here. There are, moreover, approximately 863 community action agencies throughout the United States, and failure to resolve the question presented here may lead to further litigation arising out of the continuing activities of those agencies.

Failure to review and reverse the decision below may also lead to litigation arising out of the allegedly negligent acts of employees of other types of federally funded or assisted organizations. Cf. *United States* v. *Del Toro*, *supra* (involving an employee of a federally funded "Model Cities program").

CONCLUSION

The petition for a writ of certiorari should be granted. If the petition for a writ of certiorari in *Vincent* is also granted, the Court may wish to consolidate the two cases for argument.

Respectfully submitted.

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APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 74–1496

JOSEPH V. ORLEANS, BY HIS FATHER AND NEXT FRIEND, JOSEPH A. ORLEANS, ET AL., PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed January 18, 1975.

Before: PECK and LIVELY, *Circuit Judges;* and McALLISTER, *Senior Circuit Judge.*

LIVELY, *Circuit Judge.* This action was filed under the Federal Tort Claims Act to recover for personal injuries suffered by the plaintiff in an automobile accident. Plaintiff was one of a group of children who had been taken to a recreational area some distance from their homes on an outing which was part of the program of the Westlawn Neighborhood Opportunity Center (Westlawn). Westlawn was an "activity" of the Warren-Trumbull Council for Economic Opportunity, Inc. (WTCEO). A van was furnished by WTCEO to Westlawn for the outing, but it was not large enough to carry all the children who turned out for the affair. Employees of WTCEO arranged for two young men from the Westlawn area to drive some of the children to the outing in privately owned automobiles. Plaintiff was a passenger in an automobile driven by Robert Walker and owned by

Robert's father on the return trip when the accident occurred.

The complaint alleged that the outing was sponsored by the Office of Economic Opportunity and "that the agents of the United States of America in charge of said outing were negligent in the organization and supervision of said outing . . ." resulting in plaintiff's injuries. The government answered that WTCEO is not an agent or instrumentality of the United States, nor is Westlawn such an instrumentality. In addition, the defendant denied that any agents of the United States were "present during, before, or after the described outing."

The defendant then moved for summary judgment and filed with its motion the affidavit of the regional director of the Office of Economic Opportunity (OEO) having jurisdiction of WTCEO, copies of community action program grants from OEO to WTCEO and a copy of an unpublished district court opinion. The gist of the regional director's affidavit is that the supervisors of WTCEO and Westlawn were not employees of OEO on the date of the accident and that these organizations "make their own decisions as to whom to hire, discipline and discharge." It states that OEO involvement in personnel decisions of WTCEO and Westlawn "is limited to the issuance of standards." The affidavit concludes with the statement that OEO does not supervise "either on a day-to-day basis or otherwise" the activities of employees of the two organizations and that the employees are not "subject to OEO supervision or control as to the quantity or quality of the work product they produce."

In opposition to summary judgment the plaintiff filed affidavits of the chairman of the governing board of WTCEO and an attorney who had participated in the organization and management of WTCEO. In his

affidavit the board chairman stated that he was appointed directly by the Regional Office of OEO and "that presently the entire funding of the Warren-Trumbull Council for Economic Opportunity is by funds of the United States except for some so-called 'in kind' contributions, and that to his knowledge this is and has been the case throughout the history" of WTCEO. The affidavit of the attorney-board member contained *inter alia,* these statements:

> That the corporation was formed for the purpose of obtaining funds made available through the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the United States by carrying out the purposes of the Economic Opportunity Act. The corporation was carefully organized and the by-laws and regulations tailored to come within the restrictions of the Economic Opportunity Act.
>
> After the organization of the Warren Council for Economic Opportunity, Inc., it was funded almost totally by Federal funds made available through the Economic Opportunity Act, the only exception being some credit that may have been given for "in kind" services rendered by local citizens. Its management and operation were under the direct supervision of the Regional Director of the Office of Economic Opportunity in Chicago.
>
> The projects undertaken were those suggested by the Economic Opportunity Act or the directives of the Economic Opportunity Administration.
>
> One of the projects undertaken by the Warren Council for Economic Opportunity, Inc. was the Westlawn Neighborhood Opportunity Center, which project was set up in accordance with the provisions of the Economic Opportunity Act of 1964 and more specifically, that portion at 42 U.S. Code Annotated, Section 2811,

* * * * *

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The Affiant says that from the time of the organization of the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center, the Warren Council for Economic Opportunity, Inc. and Westlawn Neighborhood Opportunity Center acted as agencies to serve and assist the poor in methods and manners outlined and prescribed by the Economic Opportunity Act and numerous instructions, restrictions and requirements of the Director of the Office of Economic Opportunity. These instructions and requirements directed the manner in which the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center be organized, the classes of persons who were to be employed as directors or serve as trustees, the nature and purpose of the projects to be undertaken and the methods for carrying out such projects. Before funding was granted, the United States of America, through the Office of the Director of Economic Opportunity and his regional directors, was required to approve projects and the outlined approach for conducting them. After a project was approved, its operation was supervised by the Office of the Regional Directors in Chicago.

Without the Economic Opportunity Act and the funds made available thereunder, the Warren Council for Economic Opportunity, Inc. would not have been created and could not have operated or existed.

The plaintiff also filed depositions of a former employee of Westlawn, the former director of WTCEO and of the regional director of OEO whose affidavit had been filed by defendant. These depositions explored the relations between OEO and the local organizations, particularly with respect to personnel matters, funding and selection of projects.

In granting summary judgment for the defendant the district court found that no issue as to any material fact existed and accepted as true the following "four basic facts" urged by the plaintiff:

> First, the Warren-Trumbull Council for Economic Opportunity, Inc. was created for the purpose of carrying out the community action programs contained in the Economic Opportunity Act of 1964. Second, the Warren-Trumbull Council and its activity, the Westlawn Neighborhood Opportunity Center, received funds from no source other than the Office of Economic Opportunity. Third, the Council conducted no programs other than those formulated and funded by the federal government. Fourth, the Office of Economic Opportunity and its regional office in Chicago exercised close supervision over the Council and its activities.

The court rejected the plaintiffs conclusion that these facts require a holding that the United States may be sued under provisions of the Federal Tort Claims Act on account of the negligence of an employee of WTCEO or Westlawn. Rather, he found that the defendant was entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P.

Under the Federal Tort Claims Act recovery is allowed against the federal government generally in those cases where recovery would be permitted against a private individual or corporate defendant. 28 U.S.C. § 2674. Exclusive jurisdiction of actions for damages under this Act is vested in the district courts. 28 U.S.C. § 1346(b). Since the government acts only through its agents and employees, general principles of *respondeat superior* apply, subject to 28 U.S.C. § 2671 which contains these definitions:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the

military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

The district court concluded that WTCEO is a contractor with OEO and "thus the government is specifically excluded from liability for torts of the employees of the council under 28 U.S.C. § 2671." The court found that the approach to eliminating poverty which Congress adopted in the Economic Opportunity Act of 1964, 42 U.S.C. § 2701 *et seq.*, was basically to rely on local community effort. The purpose of a community action council such as WTCEO is not merely to act as a federal agency to administer federal programs. Rather, the court held its responsibility is to use local capabilities to coordinate all programs in the community, including state and local programs, as well as federal ones. The fact that WTCEO received no funds other than grants from OEO and conducted no programs other than those initiated by OEO was held to be immaterial. Relying on the charter of WTCEO which permitted it to receive funds from other sources, and various provisions of the Economic Opportunity Act which define the purposes of community action councils and their relations with OEO,

the district court held that WTCEO and Westlawn were not corporations primarily acting as agencies or instrumentalities of the United States. If the two local organizations do not come within the statutory definition of "Federal agency," it follows that the acts and omissions of their employees which were charged in the complaint were not those of "Employee[s] of the government." 28 U.S.C. § 2671.

On appeal, plaintiff contends that WTCEO was not a contractor, but at all times functioned as a "Federal agency" within the definition of Section 2671. In deciding whether a given relationship is that of principal and agent or principal and independent contractor, the courts are concerned primarily with the type and extent of control retained by the principal. Generally, if the principal looks to the other party for results only, leaving to that party discretion as to means and control over the methods and details of performance, the relationship is that of principal and independent contractor. The greater the control, the greater is the likelihood of a finding of agency. In *Schetter* v. *Housing Authority of the City of Erie,* 132 F. Supp. 149 (W.D. Pa. 1955), the government defended a Federal Tort Claims Act case on the theory that a public housing authority which leased a housing project from the Federal Public Housing Administration was an independent contractor. The court noted numerous provisions of the lease which led it to "conclude that Erie is not an independent contractor since Erie was controlled by the United States with respect to the performance of the undertaking provided by the agreement between the United States and Erie." *Id.* at 152. See also *Toth* v. *United States,* 107 F. Supp. 37 (N.D. Ohio 1952). While a member of the Court of Appeals for the Eighth Circuit, Mr. Justice Blackmun wrote the opinion in *Buchanan* v. *United*

States, 305 F. 2d 738 (1962), which listed some of the factors to be considered in deciding whether a person is an independent contractor as follows: "(1) Control of the work; (2) control of the premises; (3) control over the means of performance; (4) nature of the work done; (5) supervision of work; (6) control of personnel; (7) furnishing of personnel and material; (8) method of payment; (9) freedom of the contractor in employment policy; and (10) procurement of insurance covering personnel, social security payments, and like items." *Id.* at 742.

There are a number of cases in which independent contractor status was assumed, but the contention was made that particular circumstances had caused the principal to lose his insulation from liability for negligence of employees of the contractor. In *Lipka* v. *United States,* 369 F. 2d 288 (2d Cir. 1966), it was held that the independent contractor status of one engaged by the Corps of Engineers was not destroyed by reservation of the power to control the contractor's compliance with specifications or the institution of an accident prevention program. A similar result was reached in *United States* v. *Page,* 350 F. 2d 28 (10th Cir. 1965), where it was held that reservation of the right to make safety inspections and to require greater safety precautions than those normally practiced by the contractor in question did not make the principal liable for negligent acts of the contractor. See also *Gowdy* v. *United States,* 412 F. 2d 525 (6th Cir. 1969). On the other hand, the government has been held liable for negligent acts of employees of a contractor whose performance was subject to detailed supervision by a public housing authority. *Maryland* v. *Manor Real Estate & Trust Company,* 176 F. 2d 414 (4th Cir. 1949). In *Logue* v. *United States,* 412 U.S. 521 (1973), the Supreme Court stated that the pur-

pose of the exclusion of "contractors with the United States" found in Section 2671 is to afford the government the same immunity from tort liability arising out of negligent acts of an employee of a contractor as is enjoyed by private individuals who deal with such contractors. As the Court said, it is based on the "traditional distinction between employees of the principal and employees of an independent contractor." *Id.* at 527. If the principal lacks authority to control the detailed performance of the contractor, it cannot be treated in law as the employer of that contractor's employees. Only if the principal has the right to supervise the "physical performance" of the work of such employees do they become employees of the principal. *Id.* at 531.

The question in this case is whether a community action council formed for the purposes of the Economic Opportunity Act, which receives funds solely from the federal government and operates within the statutory and regulatory "guidelines" of OEO which are applicable to such councils, is to be deemed a federal agency or an independent contractor with the government when sued by a "client" of the agency claiming injury as the result of negligence on the part of agency employees. In seeking analogies in decisions involving other federally funded programs it is necessary to keep in mind the concept of the importance of using all the resources of the local community to fight poverty which underlies the Economic Opportunity Act of 1964. From the President's message on poverty of March 16, 1964 (S. Doc. No. 86, 88th Cong., 2d Sess. 2–4 (1964)) (hereafter Sen. Doc.) through the Congressional presentation of Sargent Shriver of March 17, 1964 (Sen. Doc. 35–74) and the legislative history of the Act itself there is a clear and repeated emphasis on the importance of local community par-

ticipation. Furthermore, an examination of the affidavits and depositions filed by the plaintiff leaves no room for doubt that the purpose of WTCEO is to implement in the community which it serves the policy and goal of eliminating poverty in the Nation as expressed by Congress in the Economic Opportunity Act of 1964. In pursuing this policy Congress established the Office of Economic Opportunity in the Executive Office of the President. Central to the scheme of the Act are the provisions for community action programs. 42 U.S.C. §§ 2781–2837. The determination to be made is whether, in choosing to fight this sector of the "war on poverty" by utilizing community action agencies rather than acting directly through OEO at the local level, Congress intended for these community organizations to be "Federal agencies" within the definition contained in the Tort Claims Act.

Several sections of the Economic Opportunity Act must be examined. With respect to community action governing boards, 42 U.S.C. § 2791(e) provides:

> (e) The powers of every community action agency governing board shall include the power to appoint persons to senior staff positions, to determine major personnel, fiscal, and program policies, to approve overall program plans and priorities, and to assure compliance with conditions of and approve proposals for financial assistance under this subchapter.

Section 2795 deals with the powers of the agencies themselves, in part as follows:

> (a) In order to carry out its overall responsibility for planning, coordinating, evaluating, and administering a community action program, a community action agency must have authority under its charter or applicable law to receive and administer funds under this subchapter, funds and contributions from private or local

> public sources which may be used in support of a community action program, and funds under any Federal or State assistance program pursuant to which a public or private nonprofit agency (as the case may be) organized in accordance with this part could act as grantee, contractor, or sponsor of projects appropriate for inclusion in a community action program. A community action agency must also be empowered to transfer funds so received, and to delegate powers to other agencies, subject to the powers of its governing board and its overall program responsibilities. This power to transfer funds and delegate powers must include the power to make transfers and delegations covering component projects in all cases where this will contribute to efficiency and effectiveness or otherwise further program objectives.

The Act also sets administrative standards for operation of community action agencies and requires them to adopt "rules designed to establish specific standards" relating to employee pay and benefits and promotion procedures, the avoidance of conflicts of interest and appropriate advocacy on behalf of the poor without participation in picketing, protest or violation of law. 42 U.S.C. § 2796(a). The provisions for financial assistance from OEO to community action agencies are found in Section 2808, which provides in sub-section (e) that—

> (e) In order to promote local responsibility and initiative, the Director shall not establish binding national priorities on funds authorized by this section, but he shall review each application for financial assistance on its merits. Before extending financial assistance to a new community action agency under this section, and in determining the amount of and conditions on which such assistance shall be extended, the Director shall consider the extent and nature of poverty in the community and the prob-

> able capacity of the agency to carry out an effective program. In reviewing or supplementing financial assistance to a previously existing community action agency, he shall consider the progress made in carrying on programs by such agency.

The relationship between OEO and WTCEO meets a number of the criteria for establishing that WTCEO is an independent contractor. There was no showing that OEO controlled or supervised the physical performance of the work of employees of WTCEO and Westlawn. Moreover, the requirements imposed on these local agencies by statute and regulations are not concerned with the details of the day-to-day operations of the agencies or the programs which they carry on in the Warren-Trumbull County area. They are more in the nature of general instructions to be followed in order to assure that certain policies which Congress had adopted in establishing OEO are respected and adhered to. On the other hand, by withholding approval of its operations, OEO had for all intents and purposes put WTCEO out of business for a period of time and had in October 1972 selected a new chairman of its board who completely reorganized the agency. These are not powers usually possessed by a principal in dealing with an independent contractor.

The plaintiff argues that the court should not decide the issue on potentialities, but on actuality. He maintains it is irrelevant that WTCEO might have obtained funds from other sources and might have carried on programs other than those planned by OEO. The fact is, he contends, that WTCEO never had any funds except those from the federal treasury which were granted to it by OEO and never initiated a single program other than the "canned" ones offered to it by OEO. The facts of the actual history of the operation of WTCEO, including the incident which demonstrated that OEO possessed the power to dictate to its governing board, lead to the conclusion, he maintains, that WTCEO was a corporation primarily acting as an instrumentality or agency of the United States, and therefore a "Federal agency" as defined in 28 U.S.C. § 2671.

In two cases involving the rights of employees of community action agencies similar to WTCEO, the Fifth Circuit has held that such employees were employees of a private corporation and not of the government. *Robles* v. *El Paso Community Action Agency, Project Bravo, Inc.*, 456 F. 2d 189 (1972); *Hines* v. *Cenla Community Action Committee, Inc.*, 474 F. 2d 1052 (1973). Though neither of these cases arose under the Federal Torts Claims Act and the agency-contractor dichotomy was not present, decision in both was based on a finding that the plaintiffs were not public employees. In his dissent in the *Cenla* case, Judge Wisdom pointed to some of the controls which OEO retained in its dealings with the local agency in the following language:

> As appears from the complaint, Cenla was organized for the purpose of qualifying as a grantee community action agency of the OEO under 42 U.S.C. § 2781. Congress adopted the Equal Opportunity Act to combat poverty, to create jobs, to disburse money for the reduction or elimination of poverty, all on a national scale. To insure federal supervision and uniformity, OEO divided the country into regions and adopted guidelines. Cenla, for example, is directly responsible to Region VI of OEO in Dallas, Texas. It must comply with the guidelines and policies formulated by Region VI in Dallas. In the event of any conflict between the policies and practices of Cenla with those of Region VI or federal legislation (as interpreted by OEO), Cenla must yield. *Id.* at 1059.

We do not believe that the community action agencies created in response to passage of the Economic Opportunity Act of 1964 fit the traditional definition of independent contractors insofar as their relations with agency clients are concerned. They have ties to the OEO which do not normally exist between a principal and an independent contractor. While many of the traditional criteria of independence are present, the power in the principal to remove the governing board of the other contracting party and replace it with one of its own choosing is totally inconsistent with the status of independent contractor. Furthermore, even a cursory reading of the voluminous regulations of OEO leaves one with the distinct impression that an organization required to operate in compliance with these "guidelines" must indeed be a federal instrumentality. The controls which are retained apply particularly to relations between the local agencies and their clients who are the beneficiaries of the 1964 Act.

Congress could have chosen to administer the Economic Opportunity Act directly by establishing local offices of OEO. The declared reason for using local agencies is to assure the maximum participation of the citizens most affected by the program in each community, to the end that the particular needs of each participating community will be discovered and dealt with. Thus, a national priority in programs is forbidden. Nevertheless, OEO approval is required for each local program and all the operations of community action agencies must fit within the detailed framework ordained by OEO.

Both the Federal Tort Claims Act and the Economic Opportunity Act of 1964 were designed to remedy conditions which caused hardship and human suffering. Before the passage of the Tort Claims Act,

a person injured as the result of negligence of an employee of the government was denied a remedy which was available to another whose injuries were caused under similar circumstances by the negligence of a private individual or the employee of a private firm. Elimination of this disparity which was based on the outmoded legal fiction that "the king can do no wrong" achieved a laudable humanitarian result. Congress embarked on another humanitarian effort of monumental proportions when it undertook, with the passage of the 1964 Act, a program for the eventual elimination of poverty in this Nation.

When the two Acts here involved are read together and consideration is given to the purpose of each, it does not appear that Congress intended to shield the government from liability in a situation such as this case presents. The scheme of the 1964 Act is to improve the lot of the poor by involving them in a multitude of activities which their poverty had previously prevented them from experiencing. To the extent that participation in these activities exposes the beneficiaries of the Act to injury while engaged in approved programs under the supervision of personnel of a community action agency, the United States cannot avoid liability under the Federal Tort Claims Act on the ground that agencies chosen to achieve the purposes of the 1964 Act are not federal agencies or instrumentalities. To equate the status of such an agency with that of independent contractor under these circumstances would be to elevate form above substance.

It should be noted that this case does not present the issue of whether a member of the general public may base a Tort Claims Act proceeding on alleged negligence of an employee of a community action agency. Decision in such a case might well be reached

by resort to the traditional tests of the principal-contractor/employee relationship unaffected by the special considerations which flow from the peculiar federal responsibility for the safety and well-being of persons drawn into the programs of OEO. Nor do we intimate any opinion on the merits of the present case.

The judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

United States District Court
Northern District of Ohio
Eastern Division

Civil Action No. C 72–260–Y

JOHN V. ORLEANS, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

Order Granting Summary Judgment in Favor of Defendant

(Filed September 13, 1973)

This matter comes before the court on a motion for summary judgment filed on behalf of the United States.

The action is brought against the United States of America, pursuant to the "Tort Claims Act" by Joseph A. Orleans as father and next friend of Joseph V. Orleans, for injuries suffered by the son when the car in which he was returning home from an outing sponsored by the Westlawn Neighborhood Opportunity Center, an activity of the Warren-Trumbull Council for Economic Opportunity, Inc., left the road and collided with a parked truck.

The United States bases their motion for summary judgment on the ground that the Warren-Trumbull Council for Economic Opportunity is a contractor with the Office of Economic Opportunity and thus the government is specifically excluded from liability for torts of the employees of the council under 28 U.S.C. § 2671.

The court finds that this position is valid and the motion for summary judgment should be granted.

The Warren-Trumbull Council for Economic Opportunity, Inc. is a corporation not for profit incorporated under the authority of Section 1702.01 et seq. of the Ohio Revised Code.

The articles of incorporation filed by the Warren Council for Economic Opportunity, Inc. contain five avowed purposes. Only one of these makes any reference to federal acts or programs.

> (2) To coordinate efforts of local government units especially the City of Warren, the Warren Board of Education, Trumbull County and others, and private agencies, in programs devised under, or which shall be devised under the Economic Opportunity Act of 1964; (Exhibit A, Affidavit of William McClain.)

While it may be true that virtually all of the funds for the operation of the Warren-Trumbull Council were furnished by the O.E.O., the third purpose in the Articles of Incorporation includes the phrase ". . . to receive, administer, and disburse funds from whatever source received . . ."

The governing boards of community action agencies must have ". . . power to appoint persons to senior staff positions, to determine major personnel, fiscal and program policies, to approve overall program plans and priorities and to assure compliance with conditions of and approve proposals for financial assistance under this subchapter." 42 U.S.C. § 2791(e).

Among the functions of the boards is to establish priorities among projects, activities and areas as needed for the best and most efficient use of resources.

The Director of O.E.O. is prohibited from establishing binding national priorities by 42 U.S.C. § 2808 (e).

The Board thus has control over personnel and programs and although the Warren-Trumbull Council was virtually 100% funded by O.E.O., they were empowered to receive and distribute funds from other sources.

In the case of *George Freeman, Jr., et al. v. Wendall Verdun, et al.*, C 72–1292 Y, this court found that the Warren-Trumbull Council for Economic Opportunity, Inc. is an independent corporation not for profit and as such is a private employer, thus the employees are not government employees.

In accord with this decision is *Robles v. El Paso Community Action Agency, Project Bravo, Inc., et al.*, 456 F.2d 189. In this case an employee sued a community action agency seeking reinstatement to a position from which she had been released. The court at pages 190 f. writes:

> As a community agency, the El Paso Community Action Agency Project Bravo, Inc., receives federal assistance by grant from the Office of Economic Opportunity to carry out a community action program pursuant to the provisions of the Economic Opportunity Act of 1964, Title 42, U.S.C. § 2790 et seq. . . . Once federal funds are granted for the purposes of such program, the El Paso Community Action Agency Project Bravo, Inc. is required to carry out its program in accordance with the terms of the federal funds grant and the general and specific conditions that may be laid down as the terms on which federal funds will be made available. These terms and conditions include requirements that funds be spent only for purposes specified in the approved application, requirements for accountability by means of internal fiscal controls, regular financial reports, and independent audits, and assurances against discriminatory employment practices or discriminatory treatment of beneficiaries on

> grounds of race or color. Such terms and conditions do not give the Office of Economic Opportunity the right to direct the manner of carrying out the approved program, nor do they give the Office of Economic Opportunity the right to select or discharge Project Bravo employees.

Judge Morris E. Lasker of the United States District Court for the Southern District of New York in the case of *Johnson* v. *Jumelle,* 359 F.Supp. 361 (1973) at page 362 quotes the above passage as support for the premise that an employee of a community action agency in New York City was not a federal employee.

Plaintiff cites *Toth* v. *United States,* 107 F.Supp. 34 (N.D. Ohio, E.D. 1952) and *Schetter* v. *Housing Authority of the City of Erie,* 132 F.Supp. 149 (W.D.Pa. 1955) as support for the position that the Warren-Trumbull Council for Economic Opportunity, Inc. is a corporation primarily acting as an instrumentality or agency of the United States.

Both of these cases concern injuries to persons in public housing. Both cases had written agreements between the local authority and the Public Housing Administration which provided that the United States was to receive all profits from the operation of the housing, the United States was to retain ownership of the land and was to receive back the improvements after the lease expired.

The United States further maintained control of fiscal affairs and management of the local authority involved. The government also controlled the selection of tenants, rent rates, employment terms and wages and the persons to be hired.

The court finds that the degree of control exercised by the Office of Economic Opportunity, Inc. was not as stringent as that exercised by the Public Housing

Administration over the respective local housing authorities. This court further finds no parallel between the contracts in the housing cases and the facts in the immediate case.

The plaintiff also cites *Delgado* v. *Akins,* 236 F. Supp. 202 (D.Ariz. 1964). In this case, the United States was held liable for the tort of a county agricultural agent. The bases for the court's decision were that the agent could be fired by the Department of Agriculture, that he was paid by a local committee from Department of Agriculture funds which were deposited by the Department in a local bank account, and that the county agency was also required to be listed in the local telephone directory under the heading United States Department of Agriculture. None of the above indicia of control are present in the instant case.

The court finds no relevance at all in the citations to the non-appropriated fund agency line of cases such as *United States* v. *Holcombe,* 277 F. 2d 143 (1960).

The court finds that the Warren-Trumbull Council for Economic Opportunity, Inc. is an independent private non-profit Ohio corporation and is a contractor with the United States and not a corporation acting as an instrumentality or agency of the United States. The court further finds that the employees of the Warren-Trumbull Council for Economic Opportunity, Inc. and its activity the Westlawn Neighborhood Opportunity Center are not federal employees under the meaning of 28 U.S.C. § 2671.

The court, therefore, finds that summary judgment must be granted in favor of the defendant United States of America.

IT IS SO ORDERED.

/s/ LEROY J. CONTIE, JR.,
U.S. District Judge.

MEMORANDUM OPINION AND ORDER

(Filed January 9, 1974)

This matter comes before the court on a motion filed on behalf of the plainiffs asking the court to reconsider its ruling that the Warren-Trumbull Council for Economic Opportunity, Inc. and its subordinate activity, The Westlawn Neighborhood Opportunity Center are not Federal agencies within the definition of the Federal Tort Claims Act, 28 U.S.C. § 2671, and hence the United States is entitled to summary judgment.

The court has reviewed the briefs, and heard oral arguments on the present motion and has further reviewed the briefs and evidence filed in connection with defendant's original motion. The court finds that the original ruling was correct and must be reaffirmed.

The term "Federal Agency" as used in the "Federal Tort Claims Act" is defined as including ". . . the executive departments, the military departments, independent establishments of the United States and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States." 28 U.S.C. § 2671.

The plaintiffs in this case urge the court to find that the Warren-Trumbull Council for Economic Opportunity, Inc. is a corporation acting primarily as an instrumentality or agency of the United States and as such is included as a "Federal Agency" under the "Federal Tort Claims Act". To establish this position, the plaintiffs emphasize four points. First, the Warren-Trumbull Council for Economic Opportunity, Inc. was created for the purpose of carrying out the community action programs contained in the Economic Opportunity Act of 1964. Second, the Warren-Trumbull Council and its activity, the Westlawn Neighborhood Opportunity Center, received funds from no

source other than the Office of Economic Opportunity. Third, the Council conducted no programs other than those formulated and funded by the federal government. Fourth, the Office of Economic Opportunity and its regional office in Chicago exercised close supervision over the Council and its activities.

The court accepts the four basic facts upon which plaintiffs base their conclusion, but for the following reasons rejects their conclusion.

Congress provided two methods by which a community could receive federal aid under the community action section of the Economic Opportunity Act of 1964. First, a state or qualified subdivision or combinations of subdivisions, such as the City of Warren and Trumbull County, could act as their own community action agency or the same entities could designate a public or private organization, meeting the requirements of the act, as a community action agency for the area in their stead. 42 U.S.C.A. § 2790(a).

The City of Warren chose the latter course and established the predecessor organization of the Warren Trumbull Council for Economic Opportunity, Inc. as its designated community action agency. The original board was appointed by the City of Warren to meet the requirements of 42 U.S.C. § 2791(b). The City Solicitor of Warren drew up the Articles of Incorporation to correspond to the guidelines of 42 U.S.C. § 2795. The City of Warren designated the Warren Council for Economic Opportunity as its community action agency.

At a later time Trumbull County joined the City of Warren and the name was changed to the present one.

The statute setting up the composition of the governing boards of community action agencies requires

that they must consist of one-third of the members elected public officials or their designated representatives, one-third of the members elected by democratic process from the people served, and one-third representatives of business, industry, labor, religion, welfare, education and "other major groups and interests in the community". 42 U.S.C. § 2791(a).

One of the specific purposes included by Congress in their statement of purpose is:

> (1) the strengthening of community capabilities for planning and coordinating Federal, State, and other assistance related to the elimination of poverty, so that this assistance, through the efforts of local officials, organizations, and interested and affected citizens, can be made more responsive to local needs and conditions.

It would appear that Congress intends the community action agency to be a local agency for coordinating all programs in the community, State, local and others as well as federal and is to be made up of local people including local elected public officials rather than a federal agency utilizing only federal programs and run by Federal Officers.

If we accept the plaintiff's contention, the Mayor of Warren could be a Federal Official for purposes of the Federal Tort Claims Act, if he were to commit a tort while serving on the board as is required by 42 U.S.C. § 2791(b).

Congress has limited federal financial assistance to community action programs to 80% unless the Director of O.E.O. determines that it is necessary to increase the percentage for a certain program. The community is permitted to use in kind services fairly evaluated to help meet this twenty percent. 42 U.S.C. § 2812(c).

The plaintiffs in this case stress that the only contributions made by the Warren-Trumbull Council and the Westlawn Neighborhood Center were of the in kind variety and that these may not have been fairly evaluated. They make no claim of a decision by the Director of O.E.O. that the federal participation should exceed 20%.

As is required by 42 U.S.C. § 2795(a), the Articles of Incorporation of the Warren Trumbull Council for Economic Opportunity, Inc. contains a clause enabling the council ". . . to receive, administer and disburse funds from whatever source received . . ." The fact that the Council did not receive funds from sources other than the Federal Government whether through passive inaction or through affirmative action should not create a liability on the part of the United States when Congress did not intend the United States to be the sole source of such funds.

The Congressional statement of purpose which introduces the subchapter on community action agencies and programs states that the basic purpose of the subchapter ". . . is to stimulate a better focusing of all available local, State, private and Federal resources upon the goal of enabling low-income families, and low-income individuals of all ages in rural and urban areas, to attain the skills, knowledge, and motivations and secure the opportunities needed for them to become fully self sufficient." 42 U.S.C. § 2781(a). Congress also stressed in the purpose clause the necessity for local control and innovation in the new programs subject to adequate evaluation.

The components of a community action program could include ". . . projects eligible for assistance under this subchapter, or projects assisted from other public or private sources; and they may be either specially designed to meet local needs or designed pur-

suant to the eligibility standards of a State or Federal program providing assistance to a particular kind of activity which will help in meeting those needs." 42 U.S.C. § 2790(b). Binding national priorities in authorizing funds for programing are prohibited by 42 U.S.C. § 2808(c).

These declarations indicate that Congress does not intend that the community action agencies such as the Warren-Trumbull Council limit themselves to canned Federal programs; but, instead they are to utilize all sources of programs including their own ingenuity. Here again plaintiff would like the court to interpret the failure of the Council to utilize sources outside of the federal sphere as a basis for finding that the Council is acting as an instrumentality or agency of the United States.

The court recognizes that the Office of Economic Opportunity exercises very close supervision over the general organization of community action agencies and over their financial dealings and Federally funded programs.

The court even recognizes the fact that Federal funding was stopped to the Warren-Trumbull Council until the Council was reorganized and that the Regional Director of the Office of Economic Opportunity appointed Sidney I. Roberts as chairman of the governing board to implement the reorganization.

Despite this control from the Office of Economic Opportunity, the Warren-Trumbull Council still remains an independent, locally controlled and constituted non-profit corporation. While the Office of Economic Opportunity has the power to cut off Federal funds if the council fails to meet federal standards, they have no power to cut off funds from other sources which the council is encouraged to utilize, and, while the O.E.O. maintains close supervision over the Federally packaged programs, the locally financed and constituted programs that community action agencies are encouraged to run are not subject to such control.

Thus, this court finds that the Warren-Trumbull Council for Economic Opportunity is a locally constituted and controlled independent corporation, not for profit, organized under the State of Ohio by the City of Warren and Trumbull County to combat poverty in the Warren-Trumbull County area by accepting federal funds and programs. While it does not seek or accept funds from other sources, it is empowered to do so by its charter and encouraged to by Congress. Also, while it does not institute its own projects, it is empowered to do so by its charter and is encouraged to do so by Congress. Thus, instead of becoming an independent organization carrying on programs initiated and funded by a variety of sources as envisioned by Congress, the Warren-Trumbull Council for Economic Opportunity, Inc. has become, in effect, an organization to contract with the Office of Economic Opportunity for Federal funds to run prepackaged Federal programs for the Warren-Trumbull County Area.

For these reasons and those included in the original order filed September 13, 1973, the court finds that its prior ruling granting defendant's motion for summary judgment must be affirmed.

IT IS SO ORDERED.

/s/ LEROY J. CONTIE, JR.,
U.S. District Judge.

APPENDIX C

United States Court of Appeals for the Sixth Circuit

No. 74–1496

JOSEPH V. ORLEANS, BY HIS FATHER AND NEXT FRIEND, JOSEPH A. ORLEANS, ET AL., PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

Before: PECK and LIVELY, *Circuit Judges;* and MCALLISTER, *Senior Circuit Judge.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard for the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause is remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from Defendant-Appellee, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by Order of the Court.

JOHN P. HEHMAN,
Clerk.

A True Copy, Attest:

JOHN P. HEHMAN,
Clerk.

Supreme Court, U. S.
FILED
DEC 11 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-328

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH V. ORLEANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED
AUGUST 30, 1975
CERTIORARI GRANTED OCTOBER 20, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-328

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH V. ORLEANS, ET AL.

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398-641—75

United States District Court, Northern District of Ohio, Eastern Division

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Civil Action No. C 72-260-Y

JOHN V. ORLEANS, ET AL.

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

Date	Proceedings
1972	
Mar. 17	Complaint filed. Summons issued. Copies to the U.S. Marshal.
July 21	Interrogatories of the deft. filed.
July 25	Answer filed. Mld. 7-21-72.
Oct. 18	Answers of the Plaintiff to Defendants' Interrogatories filed.
Oct. 18	Interrogatories of the Plaintiff directed to the Defendant filed.
Nov. 28	Deposition of Robert Howard Walker filed.
Dec. 18	Motion of the Deft. United States of America for Summary Judgment filed. Memorandum, Affidavit & Exhibits in support attached filed.
1973	
Jan. 17	Depo. of Ellen Stanton for pltf. filed.
Jan. 17	Depo. of Dr. Edw. Bauman for pltf. filed.
Jan. 17	Dept. of Leaster Peterman for pltf. filed.
Feb. 23	Deposition of Wendell Verduin taken 1-31-73 at 10:30 A.M. filed. Deposition of the Plaintiff—Deposition Exhibits under separate cover.
1973	
June 28	Memorandum of the Plaintiffs in opposition to Defendant's motion for Summary Judgment with Affidavit and exihibts attached filed.
Sept. 13	Order that the Court finds that Summary Judgment must be granted in favor of the Defendant, United States of America filed. Contie, J.

Date	Proceedings
1973	
Sept. 20	Motion of the Plaintiffs for Re-Hearing and Oral Argument with Brief.
Nov. 1	Minutes of Trial Proceedings filed. Contie, J. Thompson, R. Oral hearing on motion for reconsideration begun and concluded Heard & Submitted.
1974	
Jan. 9	Memorandum Opinion and Order filed. Contie, J.
March 6	Notice of Appeal filed.
April 8	Certified Original Pleadings mailed to the Clerk for the U.S.C.A. 6th Circuit.
May 3	Certified Record received in U.S.C.A. and filed. 5-1-74 (74-1496)

United States Court of Appeals for the Sixth Circuit

No. 74-1496

JOSEPH V. ORLEANS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

RELEVANT DOCKET ENTRIES

Date	Proceedings
1974	
May 1	*Certified record* (1 vol. pleadings with 4 vols. depositions), filed; and caused docketed.
July 1	Motion: Appellee's brief until 30 days after ruling on motion to affirm. (Denied.)
July 3	Memorandum in opposition to motion to affirm.
1975	
Jan. 13	Judgment of the District Court is reversed and the case is remanded for further proceedings.
Jan. 24	Motion: Appellee's Petition for rehearing to 2/18/75. (Granted/ Lively.)
Feb. 18	Twenty-five copies of petition for rehearing in banc (for USA.)
Apr. 2	Order denying petition for rehearing (Peck, Lively and McAllister, JJ.)
Apr. 7	Motion of Appellee for stay of the mandate.
Apr. 21	Order staying mandate thirty days (Lively, J.)
May 14	Motion of Appellee for further stay of mandate (Granted to 6/6/75, Lively, J.)
June 5	Appellee's motion for additional 28-day stay of mandate to 7/1/75.
June 30	Motion: Additional stay of mandate to 7/31/75.
July 18	Order staying mandate thirty days (Lively, J.).
Aug. 18	Appellee's motion for further stay of mandate pending filing of petition for writ of certiorari.
Sept. 3	Order staying mandate thirty days (Lively, J.).
Sept. 8	Notice of filing petition for certiorari 8/30/75 (Sup. Ct. No. 75-328).
Oct. 30	Certified copy of order of Supreme Court granting certiorari 10/20/75.

In the United States District Court for the Northern District of Ohio, Eastern Division

Civil Action No. C 72-260-Y

JOSEPH V. ORLEANS, BY AND THROUGH HIS FATHER AND NEXT FRIEND, JOSEPH A. ORLEANS, AND JOSEPH A. ORLEANS, 2104 UNION STREET, S.W., WARREN, OHIO, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Civil Action No. C 72-260-Y

COMPLAINT

FIRST CLAIM FOR RELIEF

1. Now comes the plaintiff, JOSEPH V. ORLEANS, by and through his father and next friend, JOSEPH A. ORLEANS, and for his complaint against the defendant says that his action is brought pursuant to the Federal Tort Claims Act and jurisdiction of this Court arises by reason of the provisions of said Act.

2. The minor plaintiff says that on or about September 3, 1970, he was a participant in an outing sponsored by the Office for Economic Opportunity; that the agents of the United States of America in charge of said outing were negligent in the organization and supervision of said outing and by virtue of said negligence the minor plaintiff was caused to be in an automobile accident as a result of which he suffered severe injuries to his person, including the loss of his right arm, all to his damage in the sum of One Million Dollars ($1,000,000.00).

SECOND CLAIM FOR RELIEF

3. Plaintiff, JOSEPH A. ORLEANS, says that he is the father of the minor plaintiff, JOSEPH V. ORLEANS, and incorporates herein as though fully set forth all of the alle-

gations in the First Claim for Relief and says further that he and his son have exhausted their administrative remedies and that on January 5, 1972, plaintiffs, through their attorneys, were orally authorized by administrative authority to proceed with suit against the defendant and that written confirmation of this authorization was to follow but that up to this time such written authorization has not been received.

4. Plaintiff, JOSEPH A. ORLEANS, says that by reason of the injuries received by his son he has been required to incur expense for medical and hospital treatment and preparation of artificial limbs, the total of said expenses being approximately Twenty-five Hundred Dollars ($2500.00) to date and that said expenses are likely to continue into the future.

5. Plaintiff, JOSEPH A. ORLEANS, says further that he has lost the services of his son and by reason of the loss of services and expenses is damaged in the sum of One Hundred Thousand Dollars ($100,000.00).

Wherefore, plaintiff, JOSEPH V. ORLEANS, prays damage against the defendant in the sum of One Million Dollars ($1,000,000.00) and plaintiff, JOSEPH A. ORLEANS, prays damage against the defendant in the sum of One Hundred Thousand Dollars ($100,000.00), together with the costs of this action.

PFAU, COMSTOCK & SPRINGER,
WILLIAM E. PFAU, Jr.,
Trial Counsel,
Youngstown, Ohio,
Attorneys for Plaintiffs.

In the United States District Court for the Northern District of Ohio, Eastern Division

Civil Action C 72–260–Y

JOSEPH V. ORLEANS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

ANSWER

Now comes the defendant, United States of America and denies all allegations in the Complaint for want of knowledge, except Claim 1 herein which it specifically admits to be true.

DEFENSE

1. The United States avers that the Warren Trumbull Council is not an agency or instrumentality of the United States Government.

2. The defendant avers that the Westlawn Neighborhood Opportunity Center is not an instrumentality of the United States Government.

3. The defendant further states that at no time were agents of the United States of America present during, before, or after the described outing.

Wherefore, the defendant, United States of America claims that it is in no way liable, directly, vicariously or otherwise in the alleged occurrence in question, and that for the above reasons the United States prays that this case be dismissed at plaintiff's costs.

FREDERICK M. COLEMAN,
U.S. Attorney.
By JOSEPH T. MCGINNESS,
Asst. United States Attorney.

In the United States District Court for the Northern District of Ohio, Eastern Division

Civil Action No. C 72–260–Y

JOSEPH V. ORLEANS, ET AL., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

MOTION FOR SUMMARY JUDGMENT

Defendant United States of America pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully moves for summary judgment in the above entitled action on the ground that the Court is without jurisdiction over the United States in that the Westlawn Neighborhood Opportunity Center and the Warren Trumbull Council are not

598-641—75——2

instrumentalities or agencies of the United States within the purview and scope of 28 U.S.C. 2671; and there exists no genuine issue as to any material fact; and that defendant is entitled to judgment as a matter of law.

In support of this motion, defendant attaches hereto and makes part hereof: (1) the Affidavit of the Regional Director of the Office of Economic Opportunity, Chicago Region, (defendant's Exhibit "A"); (2) copies of Community Action Program Grants, from the Office of Economic Opportunity to the Warren Trumbull Council; (3) xerox copy of Judge Frank W. Wilson's opinion in *Sharon Dianne Anderson* v. *David Simpson* v. *Rebecca Gail Roope and Norman H. Roope and Norman H. Roope* v. *David Eugene Simpson, David Ernest Simpson, and the United States of America*, C.A. Nos. 6218 and 6358 (E.D. Tenn. S.D., Oct. 17, 1972), (defendant's Exhibit "C").

Respectfully submitted.

FREDERICK M. COLEMAN,
U.S. Attorney.
By JOSEPH T. MCGINNESS,
Assistant U.S. Attorney.

In the United States District Court for the Northern District of Ohio, Eastern Division

Civil Action C 72-260

JOSEPH V. ORLEANS, ET AL., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT

Wendell Verduin, being duly sworn, deposes and says:

1. I am the Regional Director of the Office of Economic Opportunity, Chicago Regional Office (Region V).

2. I am familiar with the complaint filed, in the above-captioned matter and the allegations contained therein.

3. All personnel actions for positions in OEO in the Chicago Regional Office which would encompass the performance of duties in the State of Ohio as well as the other states comprising Region V emanate from the Personnel Branch of the OEO Chicago Regional Office. I have caused a search to be made of OEO personnel records with the following results: The supervisors of Warren Trumbull and Westlawn Center were not agents or employees of the Office of Economic Opportunity on September 3, 1970, nor are they presently, nor were they ever.

4. As the Regional Director of the OEO Chicago Regional Office, I have the responsibility, inter alia, for the making and administering of grants under sections 221 and 222(a)(5), 222(a)(6), 222(a)(7), 222(a)(8), 222(a)(9), of the Economic Opportunity Act of 1964 for the State of Ohio.

5. Under the foregoing statutory authority, OEO has granted funds, starting on June 1, 1970, and thereafter, to Warren Trumbull Council, a non-profit organization and recognized by the Office of Economic Opportunity as an overall community action for the conduct of community action programs.

6. There is no knowledge or information to support a belief that Warren Trumbull or Westlawn employees are federally selected, federally supervised or disciplined, recieve direct federal stipends or pay, or take a federal oath of office. Warren Trumbull and Westlawn make their own decisions as to whom to hire, discipline and discharge. Any attempt by OEO at regulating, hiring and firing practices for grantee personnel is limited to the issuance of standards and OEO does not control employment practices in specific cases. There is no record that OEO was in any way involved in the decision to hire any of the Warren Trumbull or Westlawn employees. Moreover, OEO does not supervise either on a day-to-day basis or otherwise, the activities of grantee employees. Nor are grantee employees subject to OEO supervision or control as to the quantity or quality of the work product they produce.

WENDELL VERDUIN.

Subscribed and sworn to before me this 11th day of December 1972.

CARRIE W. STINSON,
Notary Public.

PAGE OF PAGES

OFFICE OF ECONOMIC OPPORTUNITY - COMMUNITY ACTION PROGRAM

STATEMENT OF CAP GRANT

1. GRANT NO. 4005 - 2D / 2 (PROG. YR. / ACT. NO.)

2. NAME AND ADDRESS OF GRANTEE
Warren-Trumbull Council for Economic Opportunity
203 Pine Street S. E.
Warren, Ohio 44481

2A. ORGANIZATION NO. 51075

3. NAME AND TITLE OF EXECUTIVE DIRECTOR
Lee B. Shelton, Executive Director

4. EFFECTIVE DATE OF GRANT ACTION: June 1, 1970

5. END OF PROGRAM YEAR

6. TERMINATION DATE: September 30, 1971

7. SECTION(S) OF EOA: 221

8. FEDERAL SHARE OF PROGRAM COST FOR THIS PROGRAM YEAR MAY NOT EXCEED ___ 80 %

PROGRAM ACCOUNTS APPROVED THIS GRANT ACTION FOR THIS PROGRAM YEAR — PROGRAM ACCOUNT NAME	FEDERAL SHARE: TOTAL FEDERAL SHARE (TOA)	FEDERAL SHARE: CARRY-OVER FUNDS ASSIGNED *	FEDERAL SHARE: ADDITIONAL FEDERAL FUNDS (NOA)	NON-FEDERAL SHARE	TOTAL PROGRAM: TOTAL COSTS	TOTAL PROGRAM: PERSONNEL COSTS	TOTAL PROGRAM: NON-PERSONNEL COSTS	NO. OF MOS.
20 Special Youth Program	$33,348	-0-	$33,348	$20,106	$ 53,454	$33,366	$20,088	16
A. TOTALS CARRIED FORWARD FROM ATTACHED PAGES (if any)								
B. TOTAL APPROVED THIS GRANT ACTION FOR THIS PROGRAM YEAR	$ 33,348	-0-	$ 33,348	$20,106	$ 53,454	$33,366	$20,088	
C. TOTAL PREVIOUSLY APPROVED FOR THIS PROGRAM YEAR	170,172	1,151	169,021	47,960	218,132	N/A	N/A	
D. TOTAL APPROVED TO DATE FOR THIS PROGRAM YEAR	$203,520	$1,151	$202,369	$68,066	$271,586	N/A	N/A	

9. STATEMENT OF OEO APPROVAL

In accordance with Column (5), Line B, are hereby obligated for the program proposed by the grantee as described above and in the attachments to this statement. Program account budgets are approved only to the extent they conform to applicable general flexibility guidelines or in accordance with [illegible] approval.

APPROVED BY: (Signature and title)

DATE: OCT 23 1970

10. GRANTEE ACCEPTANCE OF GRANT

On behalf of the grantee, I accept the grant and all modifications, general and special conditions, and requirements contained in the attached ___ pages.

ACCEPTED BY: (Signature and title of authorized official)

DATE

10

PAGE OF PAGES

OFFICE OF ECONOMIC OPPORTUNITY - COMMUNITY ACTION PROGRAM

STATEMENT OF CAP GRANT

1. GRANT NO. 4005 - F / 0 (PROG. YR. / ACT. NO.)

2. NAME AND ADDRESS OF GRANTEE
Warren-Trumbull Council for Economic Opport.
262 East Market Street
Warren, Ohio 44481

2A. ORGANIZATION NO. 51075

3. NAME AND TITLE OF EXECUTIVE DIRECTOR
Lester Peterman, Executive Director

4. EFFECTIVE DATE OF GRANT ACTION: 10/1/71

5. END OF PROGRAM YEAR

6. TERMINATION DATE: 3/31/72

7. SECTION(S) OF EOA: 221

8. FEDERAL SHARE OF PROGRAM COST FOR THIS PROGRAM YEAR MAY NOT EXCEED ___ 80 %

PROGRAM ACCOUNTS APPROVED THIS GRANT ACTION FOR THIS PROGRAM YEAR — NO. / PROGRAM ACCOUNT NAME	FEDERAL SHARE: TOTAL FEDERAL SHARE (TOA)	FEDERAL SHARE: CARRY-OVER FUNDS ASSIGNED *	FEDERAL SHARE: ADDITIONAL FEDERAL FUNDS (NOA)	NON-FEDERAL SHARE	TOTAL PROGRAM: TOTAL COSTS	TOTAL PROGRAM: PERSONNEL COSTS	TOTAL PROGRAM: NON-PERSONNEL COSTS	NO. OF MOS.
CK1								
H 01 CK1 Administration	18,722	-0-	18,722	740	19,462	14,137	5,325	6
CK1 Neighborhood								
H 07 Service Systems	62,279	-0-	62,279	26,192	88,471	57,882	30,589	6
CK1								
H 17 Day Care	10,000	-0-	10,000	2,500	12,500	6,000	6,500	6
A. TOTALS CARRIED FORWARD FROM ATTACHED PAGES (if any)	-0-	-0-	-0-	-0-	-0-	-0-	-0-	
B. TOTAL APPROVED THIS GRANT ACTION FOR THIS PROGRAM YEAR	91,001	-0-	91,001	29,432	120,433	78,019	42,414	
C. TOTAL PREVIOUSLY APPROVED FOR THIS PROGRAM YEAR	-0-	-0-	-0-	-0-	-0-	-0-	-0-	
D. TOTAL APPROVED TO DATE FOR THIS PROGRAM YEAR	91,001	-0-	91,001	29,432	120,433	78,019	42,414	

9. STATEMENT OF OEO APPROVAL

In accordance with Column (5), Line B, are hereby obligated for the program proposed by the grantee as described above and in the attachments to this statement. Program account budgets are approved only to the extent they conform to applicable general flexibility guidelines or in accordance with [illegible] approval.

APPROVED BY: (Signature and title)

DATE

10. GRANTEE ACCEPTANCE OF GRANT

On behalf of the grantee, I accept the grant and all modifications, general and special conditions, and requirements contained in the attached ___ pages.

ACCEPTED BY: (Signature and title of authorized official)

11

APPLICATION FOR RECOGNITION OF A
COMMUNITY ACTION AGENCY

SECTION I. GENERAL INFORMATION

1. PROPOSED NAME OF COMMUNITY ACTION AGENCY

WARREN TRUMBULL COUNCIL FOR ECONOMIC OPPORTUNITY

2. MAILING ADDRESS (If unchanged)

A. NO. AND STREET	B. CITY	C. STATE	D. ZIP CODE
206 Pine St. S.E.	Warren	Ohio	44481

3. NAME OF PERSON TO CONTACT

James Shelton - Executive Director

4. TELEPHONE NO. (Include Area Code)

216-392-2532

5. NAME(S) OF POLITICAL JURISDICTION(S) DESIGNATING COMMUNITY ACTION AGENCY

Trumbull County Commissioners

6. IS THE DESIGNATED CAA ONE CURRENTLY APPROVED BY OEO?

☒ YES ☐ NO

7. IS THE DESIGNATED CAA

☐ A STATE OR LOCAL GOVERNMENT, ☐ SEPARATE PUBLIC AGENCY,

☒ A PRIVATE NON-PROFIT AGENCY, ☐ TRIBAL COUNCIL?

8. NAME(S) OF THE COMMUNITY ACTION AGENCY WHICH WILL BE REPLACED BY THE DESIGNATED CAA:

N.A.

9. DATE PROPOSED FOR ACTIVATION OF CAA

Continuing

10. HAVE ALL POLITICAL JURISDICTIONS WITHIN THE AREA COVERED BY THE CAA BEEN GIVEN AN OPPORTUNITY TO COMMENT ON, AND HAVE THEY RESPONDED TO, THE PROPOSAL?

☒ YES ☐ NO (Explain on separate sheet of paper.)

11. PUBLIC HEARING

A. DATE PUBLIC NOTICE OF HEARING WAS GIVEN	B. DATE PUBLIC HEARING WAS HELD
5-9-68	5-9-68

C. FORM IN WHICH NOTICE OF HEARING WAS GIVEN

Press release 5-10-68

D. WAS EXISTING CAA NOTIFIED OF HEARING?

☒ YES ☐ NO

CAP FORM 70 FEB 68

O.M.B. Circ. No. A-102

NOTIFICATION OF GRANT-IN-AID ACTION

1. State application identifier
2. Federal agency use by State central information reception system

3. Awarding agency
EXECUTIVE OFFICE OF THE PRESIDENT

4. Organizational unit
OFFICE OF ECONOMIC OPPORTUNITY

5. Administrative office
GREAT LAKES REGIONAL OFFICE

6. Address (Give City and County)
623 SOUTH WABASH — CHICAGO — ILLINOIS — 60605

7. Federal agency grant identifier: 4005 — 8. Type: F/S — 9. Name: CAA ADMINISTRATION NEIGHBORHOOD SERVICE SYSTEMS

10. Purpose
Refunding

11. Grantee
12. Name: WARREN-TRUMBULL COUNCIL FOR ECONOMIC OPPORTUNITY
13. Address (Give City and County): 206 PINE ST. S.E. — WARREN — OHIO — 44481

14. Grantee type (Enter only the single most appropriate item)
☐ a. State ☐ b. Interstate ☐ c. County ☐ d. City ☐ e. School district ☐ f. Special use ☒ g. Community action ☐ h. Sponsored organization ☐ i. Other

15. Application accept date: 70 08 01
16. Action date: 70 10 01
17. Effective starting date: 70 10 01
18. Ending date: 72 09 30

19. Type of action (Check as many items as apply to this action)
☐ a. New grant ☒ b. Continuation grant ☐ c. Supplemental grant (Federally funded in item 28) ☐ d. Change in existing grant: (1) Increase in duration (2) Decrease in duration (3) Cancellation (4) Increase(3) (5) Decrease(3)

20. Amount of Contribution
a. Federal: $ 160,995 (b. Supplemental: $) — b. State: $ — c. Local: $ — d. Other: $ 40,248

21. Catalog of Federal Domestic Assistance number (Check if used, classify in item 22): a. Program Number: 49.002 — b. Supplemental Program Number:

22. Project Budget Activities
a. Federal budget activity: 04-37-0500-0-1-550
a. Project name: — b. Proj. Num. — c. Sect. — d. Act. — e. Sub-Act. — b. Proj. Num. — c. Sect. — d. Act. — e. Sub-Act.

23. U.S. Code: 42 USC 2809

24. Facility location (Give facility grant actions only)
a. City — b. County

25. Remarks

S.F. 240 (Revised) (OMB A 200) June 1972 (Replaces all previous editions of the Federal Budget Circular A-102)

I hereby certify that the documents, CAP Form 70, Application for Recognition of a Community Action Agency, and Standard Form 240, Notification of Grant-in-Aid Action herewith attached, are true copies of instruments on file in Central Files, Region V, Office of Economic Opportunity and indicate that Warren Trumbull Council For Economic Opportunity is a private non-profit corporation of the State of Ohio who applied to OEO for recognition as a community

BEST COPY AVAILABLE

action agency in 1968. Said recognition was accorded and Warren Trumbull has been the recipient of grant-in-aid funds since that date under grantee #51075.

WILLIAM L. FOREMAN, Jr.,
Assistant General Counsel.

STATE OF ILLINOIS, COUNTY OF COOK

I, William L. Foreman, Jr., on oath depose and say that I have read the foregoing by me subscribed and the same is true.

WILLIAM L. FOREMAN, Jr.

Subscribed and sworn to before me this 5th day of December, A.D. 1972.

CARRIE W. STINSON,
Notary Public.

In the United States District Court for the Eastern District of Tennessee, Southern Division

Civil Action No. 6218

SHARON DIANNE ANDERSON

v.

DAVID SIMPSON

AND

Civil Action No. 6358

REBECCA GAIL ROOPE AND NORMAN H. ROOPE

v.

DAVID EUGENE SIMPSON, DAVID ERNEST SIMPSON, AND UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

The above styled consolidated actions arose out of a single-car motor vehicle accident which occurred upon

October 1, 1970. The following facts appear to be undisputed in the record. The plaintiffs, Rebecca Gail Roope and Sharon Dianne Anderson (hereinafter referred to as plaintiffs) were riding as guest passengers in an automobile driven by the defendant, David Eugene Simpson, and owned by his father, David Ernest Simpson. At the time of the accident the plaintiffs and defendant David Eugene Simpson were students attending Lee College in Cleveland, Tennessee, and were participating in a work study program in conjunction with Lee College. Under the terms of the program the plaintiffs and the defendant were assigned to off-campus employment with Progress for People, Inc., a community action agency. One of their duties was to arrange for a tutorial program for elementary school children in the Bradley County Area. Upon October 1, 1970, plaintiffs and defendant were returning from Brittsville, Tennessee, where they had been working on such a program with local school officials when the accident occurred.

In Civil Action No. 6218, suit was instituted against the driver upon a negligence theory. The defendant driver whereupon filed a motion to dismiss, contending that he was an employee of the United States at the time the accident occurred and that suit should be against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq. Plaintiff subsequently amended her complaint to add the United States as a party defendant pursuant to said Act. (See Court File Index No. 8.)

In Civil Action No. 6358, plaintiff and her father sued the defendant and his father, David Ernest Simpson, upon a negligence theory and alternatively against the United States pursuant to the Federal Tort Claims Act. (For a Memorandum relating to prior pending motions see Index No. 11 in Civil Action No. 6358, and Index No. 8 in Civil Action No. 6218.)

Civil Action No. 6218 is presently before the Court upon the following motions: (1) motion of defendant, United States, for summary judgment; (2) motion of plaintiff for partial summary judgment; and (3) motion of plaintiff to dismiss claim against United States. Civil Action No. 6358 is before the Court upon the following motions. (1) motion of defendant United States for summary judgment; and

(2) motion of defendant David Ernest Simpson for summary judgment.

Motion of the United States for Summary Judgment

The motion for summary judgment filed by the United States is the same in both cases. The Government contends that the suit should be dismissed against it upon the following grounds: (1) the driver of the vehicle was not an employee of the United States; and (2) even if the driver was an employee of the United States acting within the scope of his employment, it is undisputed that the plaintiffs would also be employees of the United States acting within the scope of their employment, and their remedy would be pursuant to the Federal Employees Compensation Act, 5 U.S.C. §§ 8101, et seq., and not pursuant to the Federal Tort Claims Act. The Court is of the opinion that the Government's motion should be granted and that it should be dismissed from each lawsuit. In so concluding the Court is of the opinion that no issue exists in the case but that the defendant driver was not an employee of the United States at the time of the accident.

Participation in a federally sponsored work-study program does not per se make the student an employee of the United States. *Waters* v. *United States*, 328 F. Supp. 812, 814 (E.D. Ark., 1971).

In determining whether a person is an employee of the United States, federal law governs. *Fisher* v. *United States*, 356 F. 2d 706 (6th Cir., 1966). In this regard Section 2671 of Title 28, United States Code, provides as follows:

> "As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—
>
> " 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> " 'Employee of the Government' includes officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States whether with or without compensation."

The argument is made that defendant and plaintiffs are employees of Progress for People, Inc., a federally sponsored community action agency, and that Progress for People, Inc. is accordingly a federal agency within the perview of 28 U.S.C. § 2671. No cases have been cited unto the Court nor have any cases been found pertaining to the status of community action agencies under the Economic Opportunities Act.

The Economic Opportunity Act, 42 U.S.C. §§ 2701 et seq., under which Progress for People, Inc. is established and funded, was enacted by Congress in 1964. Its general purpose was to fund locally sponsored and administered programs for providing economic opportunity to low income segments of society. See Legislative History, 1964 U.S. Code & Congressional News pp. 2909, et seq.

A community action agency, under the Act, may be either a state or local political subdivision or a public or private non profit corporation or agency designated by the state. See 42 U.S.C. §§ 2790, et seq. Although composition of the boards and broad policy considerations are subject to certain federal regulation pursuant to the legislation, the intent of the legislation is to provide for local community origination and administration of programs of economic assistance, with federal participation limited to the financing of approved programs. As provided for in the legislative history:

> "This is based on the belief that local citizens know and understand their communities best and that they will be the ones to seize the initiative and provide sustained vigorous leadership. It is based, too, on the conviction that communities will commit their ideas and resources and assume responsbility for developing and carrying out local action programs. Thus, the role of the Federal Government will be to give counsel and help, *when requested*, and to make available substantial assistance in meeting the costs of these programs." 1964 U.S. Code & Congressional News at p. 2909.

Pursuant to this Act and upon local government initiative, the Bradley-Cleveland Community Action Corporation, a Tennessee non profit corporation, was organized and was

approved for receipt of federal funds for the carrying out of certain programs in Bradley County, Tennessee. The name of the Corporation was later changed to Progress for People, Inc. This corporation, as one of its programs, entered into an agreement with Lee College to conduct a work-study program using college students. The students involved in this litigation were participants in that program.

It is clear from a reading of the Act itself and from the legislative history that a community action agency, such as the one here involved, would not become a federal agency so as to make the employees thereof a federal employee. Although the program is addressed to rectifying a national concern which could properly be performed by an agency of the Federal Government, Congress saw fit to provide for local control and development of the programs. Although the Federal Government requires that certain guidelines be followed by such agencies, such as the composition of the Board of Directors and that certain administrative standards and rules be established, it does not determine the type of program to be developed nor does it determine how the plan is to be implemented. Finally, it should be noted that the United States does not finance the entire program. Rather, its funding is generally limited to 80 percent of approved programs.

The Court is accordingly of the opinion that Progress for People, Inc., a community action agency created pursuant to the Economic Opportunity Act of 1964, is not a "federal agency" within the meaning of 28 U.S.C. § 2671. The defendant driver accordingly was not an employee of a "federal agency" and there is no cause of action here stated that would fall within the Federal Tort Claims Act.

It should be further noted that the Government would be subject to being dismissed from this lawsuit even were the Court to find the defendant driver to have been an employee of the United States. It is undisputed that the driver and the passengers were each similarly engaged in the performance of their duties as employees participating in a community action program at the time the accident occurred. Accordingly, if the defendant driver were found to be an employee of the Federal Government at the time of the accident, then likewise the plaintiffs would have been employees of the United States. The only remedy in this event

would have been to seek relief pursuant to the Federal Employees Compensation Act, 5 U.S.C. §§ 8101, et seq.

Motion of the Plaintiffs for Partial Summary Judgment

One defense asserted in these cases is that the plaintiffs and the defendant driver were each employees of Lee College and that as such the exclusive remedy of the plaintiffs would be pursuant to the Tennessee Workmens Compensation Law. The plaintiff, Sharon Dianne Anderson, has filed a motion for partial summary judgment upon this issue. Although no similar motion has been filed on behalf of the plaintiffs in Civil Action No. 6358, the issues are identical and an order will enter as though identical motions for partial summary judgment had been filed. Having considered the motion for partial summary judgment, the Court is of the opinion that no issue of fact exists but that the parties to this lawsuit were not employees of Lee College, but rather were employees of Progress for People, Inc. It is likewise undisputed that Progress for People, Inc. was not within the coverage of the Tennessee Workmens Compensation Law. The plaintiffs' motion for partial summary judgment will accordingly be sustained as to this defense.

Motion of the Defendant, David Ernest Simpson, for Summary Judgment

The defendant, David Ernest Simpson, has filed a motion for summary judgment upon the issue of imputed negligence. The plaintiff alleged that the negligence of the driver would be imputed to the owner pursuant to the "Family Purpose Doctrine." During the hearing upon pending motions, plaintiffs' attorney conceded that the Family Purpose Doctrine was not applicable in this case. Accordingly, defendant's motion for summary judgment should be granted.

However, the complaint against David Ernest Simpson cannot be dismissed upon this state of the record. The complaint alleges independent acts of negligence on his part by furnishing a vehicle with defective brakes to his son and permitting the vehicle to be driven upon the roadways. Accordingly, upon this state of the record, disputed issues of fact remain for the jury.

It is accordingly ORDERED:

(1) That the United States of America be dismissed as a party to these lawsuits;

(2) That the motion of the plaintiffs for partial summary judgment be sustained as to the defense that these lawsuits are barred by the Tennessee Workmens Compensation Law; and

(3) That the motion of the defendant, David Ernest Simpson, for partial summary judgment upon the family purpose allegations of the complaint be sustained, but that the said defendant remain a party to the lawsuit in Civil Action No. 6358 under the allegations of independent acts of negligence made therein.

Approved for entry.

FRANK W. WILSON,
U.S. District Judge.

In the United States District Court, Northern District of Ohio, Eastern Division

Civil Action No. C 72–260–Y

JOSEPH V. ORLEANS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. PRELIMINARY STATEMENT OF THE NATURE OF THE CASE AND PROOFS OFFERED BY PLAINTIFFS

A. Proofs offered by the plaintiffs in support of their position and in opposition to the motion for summary judgment of the defendant and affidavit are as follows:

1. Affidavit of William L. McLain attached hereto;
2. Affidavit of John L. Breckenridge attached hereto;
3. Affidavit of Sidney I. Roberts attached hereto;

4. Deposition of Wendell Verduin and various exhibits identified therein and attached thereto—on file with the Court;
5. Deposition of Ellen Stanton on file with the Court;
6. Deposition of Leaster Peterman on file with the Court;
7. Deposition of Robert Howard Walker on file with the Court;
8. Deposition of Dr. Edward E. Bauman on file with the Court.

B. Nature of the case: This is an action under the Federal Tort Claims Act to recover damages by reason of personal injuries and loss of services arising out of an automobile accident that happened on September 3, 1970, outside of Conneaut Lake in Mercer County, Pennsylvania. At the time, the minor plaintiff was riding in an automobile being driven by Robert Walker loaded with children returning from an outing organized and sponsored by the Westlawn Neighborhood Opportunity Center, an activity of The Warren-Trumbull Council for Economic Opportunity (hereinafter referred to as WTCEO). Most of the children had gone on the outing in a van owned by the WTCEO and had returned earlier in the evening. A car being driven by Robert Walker and another car were left to follow later. At the time of the accident, Walker was trying to catch up with the other car and went off the road and struck a parked truck, causing the minor plaintiff injuries requiring the amputation of his right arm.

II. FEDERAL TORT CLAIMS ACT—DEFINITIONS AND PRINCIPLES OF CONSTRUCTION

A. Definitions: It is to be noted at the outset that the statutory definitions depart from the ordinary commonlaw rules of respondeat superior. The pertinent portion of the definition of the term "Employee of the Government" includes "persons acting on behalf of a Federal Agency in an official capacity temporarily or permanently in the service of the United States, whether with or without compensation."

The Act states that the term "Federal Agency" includes "(1) the executive departments, (2) the military depart-

ments. (3) the independent establishments of the United States, and (4) *corporations primarily acting as instrumentalities or agencies of the United States,* but (5) does not include any contractor with the United States." 28 U.S.C., part. 2671.

From the foregoing, it is obvious that if the WTCEO is a Federal Agency, its employees in charge of this trip and Robert Walker, the driver of the automobile, were in the employ of the Government within the definition of the Federal Tort Claims Act.

B. Principles of Construction:

> "Since the Tort Claims Act represents 'the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit,' the Act should be given a construction which will give full scope to the Government's relinquishment of its historic immunity from suit, one which will carry out the purposes of the legislation permitting the United States to be sued for tort and relieving the legislature of the burden of private relief bills."

Jason, Personal Injury, Handling Federal Tort Claims, Par. 69, 3–15, citing numerous cases.

Many cases support the proposition that liberal construction shall be given to the Federal Tort Claims Act. *City of Pittsburgh* v. *United States,* 359 Fed. 2d 564, 567 (3d Cir. Pa. 1966); *Pittman* v. *United States,* 341 Fed. 2d 739, 741 (9th Cir. Cal. 1965); *United States* v. *Alexander,* 238 Fed. 2d 314, 317 (5th Cir. Ga. 1956); *O'Toole* v. *United States,* 206 Fed. 2d 912, 918 (3d Cir. Del. 1953); *Somerset Seafood Co.* v. *United States,* 193 Fed. 2d 631, 634 (4th Cir. Md. 1951); *Merchants Nat'l Bank & Trust Co. of Fargo* v. *United States,* 272 Fed. Supp. 409, 417–418 (D.N.D. 1967); *Gilroy* v. *United States,* 112 Fed. Supp. 664, 666 (D.D.C. 1953); *Rushford* v. *United States,* 92 Fed. Supp. 874, 875 (NDNY 1950), aff'd 204 Fed. 2d 831 (2d Cir. N.Y. 1953).

III. ISSUE RAISED BY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant contends that WTCEO is not a Federal Instrumentality and therefore its employees are not employees of the United States within the scope of the Federal Tort Claims Act.

IV. WTCEO WAS A CORPORATION PRIMARILY ACTING AS AN INSTRUMENTALITY OR AGENCY OF THE UNITED STATES

A. The Economic Opportunity Act makes Community Action Agencies the prime instrumentalities for carrying out the intent of the Act.

The Economic Opportunity Act of ~~1964~~ as amended through December 30, 1969, and in effect at the time of this accident provided for the creation and funding of "Community Action Agencies" and the carrying out of certain programs by said agencies. Sec. 201 and Sec. 210 of the Act (42 U.S.C. 2781 and 42 U.S.C. 2790 respectively). The Act also provided for the development of "neighborhood centers" by the Community Action Agencies. Sec. 224, 42 U.S.C. 2811. A copy of the declaration and purpose of the Economic Opportunity Act and the provisions of Title II, Parts A, B and C, attached hereto marked "Appendix A" for the convenience of the Court.

The Act also created the Office of Economic Opportunity to be headed by a Director appointed by the President with the advice and consent of the Senate. Title VI, Sec. 601(a), 42 U.S.C. 2941. (Copies of the sections dealing with the appointment of authority of the Director are attached hereto as "Appendix B" for the convenience of the Court.)

The Director published a large number of regulations, restrictions and Community Action Memos, which are on file with the Court. Among others, Community Action Memo 9(a) of 2/21/67 specifically recognizes that the Community Action Agencies were intended by Congress to be the principal instruments to carry out the Community Action programs provided for by Title II, Part A, of the Economic Opportunity Act.

B. WTCEO was in fact created and existed for the sole purposes of acting as an instrumentality or agency of the United States to carry out programs established by the Economic Opportunity Act in Warren and Trumbull County.

1. The affidavit of Mr. McLain has attached to it the Articles of Incorporation, par. 2 of which is as follows:

> "To coordinate efforts of local government units, especially the City of Warren, the Warren Board of Education, Trumbull County and others, and private agencies, in programs devised under, or which shall be devised under the Economic Opportunity Act of 1964."

2. The affidavit of Mr. Breckenridge, one of the founders and thereafter an active officer or board member of the WTCEO, states:

> "That the corporation was formed for the purpose of obtaining funds made available through the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the United States by carrying out the purposes of the Economic Opportunity Act. The corporation was carefully organized and the by-laws and regulations tailored to come within the restrictions of the Economic Opportunity Act.
>
> After the organization of the Warren Council for Economic Opportunity, Inc., it was funded almost totally by Federal funds made available through the Economic Opportunity Act, the only exception being some credit that may have been given for "in kind" services rendered by local citizens. Its management and operation were under the direct supervision of the Regional Director of the Office of Economic Opportunity in Chicago.
>
> The projects undertaken were those suggested by the Economic Opportunity Act or the directives of the Economic Opportunity Administration.
>
> One of the projects undertaken by the Warren Council for Economic Opportunity, Inc was the Westlawn Neighborhood Opportunity Center, which project was set up in accordance with the provisions of the Economic Opportunity Act of 1964 and more specifically, that portion at 42 U.S. Code Annotated, Section 2811, which reads as follows:
>
> "The director shall encourage the development of neighborhood centers designed to promote the effectiveness of needed services in such fields as . . . child and economic development . . ."
>
> The Affiant says that from the time of the organization of the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center, the Warren Council for Economic Opportunity, Inc. and Westlawn Neighborhood Opportunity Center acted as agencies to serve and assist the poor in the methods and manners outlined and prescribed by the Economic Opportunity Act and numerous instructions, restrictions and requirements of the Director of the Office of Economic Opportunity. These instructions and requirements directed the manner in which the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center be organized, the classes of persons who were to be employed as directors or serve as trustees, the nature and purpose of the projects to be undertaken and the methods for carrying out such projects. Before funding was granted, the United States of America, through the Office of the Director of Economic Opportunity and his regional directors, was required to approve projects and the outlined approach for conducting them. After a project was approved, its operation was supervised by the Office of the Regional Directors in Chicago.
>
> Without the Economic Opportunity Act and the funds made available thereunder, the Warren Council for Economic Opportunity, Inc. would not have been created and could not have operated or existed."

3. The depositions of Peterman and Verduin and the affidavit of Sidney Roberts confirm the fact that the only funds other than so-called "in kind" services received by WTCEO were in Federal funds provided under the Economic Opportunity Act.

C. WTCEO was closely controlled by the Federal Government.

1. President Nixon, our Chief Executive, made this statement as quoted in the New York Times, Sunday, February 25, 1973, page one, column one:

> "President Nixon, in a radio address to the nation in explaining his reasoning for dismantling OEO and similar programs, said that such efforts as the OEO were 'laudable' but 'the results in case after case amount to dismal failure.'
>
> "Part of the solution, Mr. Nixon suggested, was to replace such 'narrow, fragmented, categorical' programs . . . until now *'closely controlled from Washington'* with special revenue-sharing grants to be used as 'each state and community judges best to meet its own special needs.'"

2. The documents which include the instructions and restrictions issued by the Director, which are on file with the Court, contain hundreds of pages of requirements. It might be noted by way of illustration that plaintiff's deposition Exhibit I for identification dated January 31, 1973,

contains the following message from Sargent Shriver, Director of the Office of Economic Opportunity:

> "In 1967, by the largest favorable vote in OEO's history, the Congress reaffirmed its commitment to the role of Community Action in the War on Poverty. At the same time the Congress significantly modified the ways in which Community Action Agencies are to be formed and operated . . ."

The pages which follow contain detailed statements of policy and administrative procedure designed to carry out the changes in the law. (Thereafter follows more than 100 pages of closely typed instructions and appendices outlining the changes.)

3. The Act itself contained detailed instructions as to the programs to be carried out and these were augmented by multiple instructions from the Director covering in detail personnel policies (Memo 23 attached to affidavit of Sidney Roberts) requirements for the membership of the governing board (Sec. 211 of the Economic Opportunity Act), regulations covering the use of buses, automobiles and other vehicles for the transportation of children, parents, etc., (Depo. Verduin, pp. 55 and 56) definition of people who may be benefited, to wit, "poor" (Memo 60041(b)). The Act itself requires that each Community Action Agency adopt a systematic approach to the achievement of the purposes of the Act (221(d)).

The Act specifically gives the Director of the Office of Economic Opportunity without limitation power to "prescribe such rules and regulations . . . and generally perform such functions and take such steps as he may deem necessary or appropriate to carry out the provisions of this Act." (Sec. 602(n))

Also, specific regulations covering in detail travel regulations (CAP Memo 35-3(a)); use of project vehicles (CAP Memo 72); reports required (CAP Memo 71); public meetings to be held and manner of notification for same (OEO instruction 7042-1).

The extent of power to control is also evidenced by the affidavit of Sidney Roberts, who states that his actual appointment as Chairman of the governing board was made by the Regional Office of the Office of Economic Opportunity.

But even more conclusive than the detailed control evidenced by the foregoing comprehensive regulations and instructions, is the fact that the Director specifically retained the right to control in all respects in which that right was not specifically exercised by an OEO instruction—OEO instruction 6002-01 providing as follows:

> "The applicant agency has considerable flexibility in determining what activities it will undertake, the manner in which these activities will be undertaken, and the families and individuals that will be assisted, *subject to the policies and procedures in this guide and to such further policies and procedures as may be issued by the OEO.*"

V. SPECIFIC DISCUSSION OF DEFENDANT'S BRIEF AND SUPPORTING DOCUMENTS

A. The affidavit of Wendell Verduin is the only document offered in support of defendant's motion. It contains largely legal conclusions and more important, does not state that WTCEO was not a corporation acting primarily as an instrumentality of the United States. Although Mr. Verduin adroitly attempted to avoid answering questions in his deposition, he did admit that WTCEO was funded by the United States to implement the purposes of the Economic Opportunity Act. This admission absent any proof by the defendant that the WTCEO was acting otherwise than as an instrumentality of the United States, would seem to conclude the issue adversely to the defendant.

B. The only case cited in support of defendant's position is the unreported District Court Memorandum Opinion in *Anderson* v. *Simpson, et al.* The opinion does not state enough facts regarding the particular agency involved to determine whether the agency involved was primarily acting as an instrumentality of the United States. The Court based his finding on two propositions, one that the type of program and the plan for its implementation of that agency were not determined by the Federal Government. In the instant case, the type of program out of which this accident arose, namely the Neighborhood Opportunity Center, was specified by the Federal Government and plans for its implementation were required and approved. The second basis of the Court for his finding was that the United States did not finance the entire program. The affidavits and depositions clearly indicate in the instant case that the United

States did finance the entire program, the local contributions being limited to "in kind" services which apparently were not carefully counted, and seemingly is a sort of fiction in these programs.

As the Court also points out, his finding that defendant driver was not an employee of a Federal Agency was not essential to the case because had he found the defendant driver to be an employee, plaintiff would have been barred by the fellow-servant rule.

VI. DISCUSSION AND SUMMARY

There is an annotation at 14 L. Ed. 2d 892, Who is an "Employee of the Government" for Whose Conduct the United States May be Held Liable Under the Federal Tort Claims Act—Federal Cases, and at page 901 the editors say:

> "7. *Status of immediate employer as federal agency or instrumentality.*
>
> In a number of cases it has been held or assumed that a particular person was the 'employee' of a particular immediate employer, but the question whether the person was an 'employee of the government,' within the meaning of the Federal Tort Claims Act, has depended upon whether such employer could properly be considered an agency or instrumentality of the federal government, and the determination whether a particular employee's immediate employer was an agency or instrumentality of the federal government has depended upon the facts and circumstances of each individual case, especially those relating to the nature of the particular immediate employer involved."

In order to view this case realistically, it must be accepted that government spending for the purpose of aiding the poor, i.e. "the war against poverty" is not essentially different than the war against communism. The instrumentalities created to conduct the war against poverty are not different from instrumentalities created to support the armed forces.

WTCEO was an agency totally committed to carry out the Federal purposes of the Economic Opportunity Act with Federal funds.

A case very close to the instant case has been decided in this district. *Toth* v. *United States*, 107 Fed. Supp. 37.

This case involved a death allegedly resulting from negligence of employees of the Youngstown Metropolitan Housing Authority. The Youngstown Metropolitan Housing Authority was a corporation which managed the Westlake Housing Project of Youngstown, Ohio, which of course was Federally funded. The Court held that the local housing authority was "acting as an instrumentality of the United States since it was required to engage personnel and provide equipment in accordance with the operating budget, management program and Government determined wage scale. This is almost precisely the situation we have in the instant case—personnel must be hired in accordance with regulations imposed to carry out the specified government programs with the Federal funds allotted.

The District Court for the Western District of Pennsylvania held similarly in *Schetter* v. *Housing Authority of the City of Erie*, 132 Fed. Supp. 149. A number of other cases have held that various organizations constituted instrumentalities of the United States. *United States* v. *Holcombe*, (1960 C.C.A. 4 Va.) 277 Fed. 2d 143, involved property allegedly damaged through the negligence of a civilian employee of a commissioned officers' mess at a United States Naval Air Station, notwithstanding the fact that the mess was financed by its own operation and was not supported by appropriations out of the United States Treasury. *Delgado* v. *Akins*, (1964 Dist. Ct. Ariz) 236 Fed. Supp. 202 held that a field reporter working for an agricultural stabilization and conservation service county committee was an employee of the United States within the meaning of the Tort Claims Act. The court emphasized the control which the United States Department of Agriculture exercised over the field reporter, pointing out that he was among the employees referred to in the handbook, bulletins, rules, and regulations promulgated by the Department of Agriculture and dealing with the general standard of employment, standard of conduct, types of misconduct subjecting employees to disciplinary action, and various similar matters. Moreover, the court noted that the field reporter was subject to spot checks which were subject to audit and review from the Department of Agriculture in Washington D.C., that the county committee was listed under the Federal Department of Agriculture in various places and was treated by the Department

as one of its instrumentalities, that the county committee's funds came from the United States Treasury, that various written and other materials provided to the county committee and its employees were from the United States Department of Agriculture, and that the salary range and steps were controlled by the Department's handbook. In the instant case, it is agreed that WTCEO was recognized as an instrumentality to carry out the purposes of the Economic Opportunity Act and was monitored by the office of Economic Opportunity (Depo. of Verduin and Peterman.)

Some other cases finding agencies to be instrumentalities of the United States are *Brucker* v. *United States,* (1964 CA9 Cal) 338 Fed. 2d 427; *Roger* v. *Elrod,* (1954, D.C. Alaska) 125 Fed. Supp. 62; and *United States* v. *Hainline,* (1963, CA10 Kan) 315 Fed. 2d 153.

From the foregoing, we respectfully submit that the facts as established by affidavit and deposition conclusively prove that the WTCEO in operating its Neighborhood Opportunity Center was acting as an instrumentality of the United States solely for the purposes of carrying out the aims of the Economic Opportunity Act and its employees were by virtue of the definition in the Federal Tort Claims Act, employees of the Federal Government.

We respectfully submit that defendant's motion for summary judgment be overruled.

Respectfully submitted.

PFAU, COMSTOCK & SPRINGER.
WILLIAM E. PFAU, Jr.,
Trial Counsel,
Youngstown, Ohio,
Attorneys for the Plaintiffs.

In the United States District Court for the Northern District of Ohio, Eastern Division

Civil Action No. C72-260-Y
Judge Leroy J. Contie, Jr.

JOSEPH V. ORLEANS, ET. AL., PLAINTIFFS
vs.
UNITED STATES OF AMERICA, DEFENDANT

Affidavit

Personally appeared before me WILLIAM P. McLAIN, who after first being duly sworn upon his oath, says that he is an attorney at law, licensed to practice in the State of Ohio; that as City Solicitor, City of Warren, Ohio he was requested to incorporate a corporation not for profit named the Warren Council for Economic Opportunity, Inc., in the year 1965; that attached hereto and marked Exhibit "A" is a true copy of the Articles of Incorporation;

That the purpose of organizing and incorporating this entity was to obtain funds from the Federal Government under the Economic Opportunity Act of 1964 by setting up an agency to act as an instrumentality to carry out the purposes and intentions of the Economic Opportunity Act of 1964;

That such organization did continue to exist and operate for these purposes; that on June 22, 1970, the Affiant prepared and filed a Statement of Continued Existence, copy of which is attached here to and marked Exhibit "B".

Further the Affiant sayeth naught.

.....
WILLIAM P. McLAIN.

State of Ohio }
County of } *ss:*

SWORN TO before me and subscribed in my presence this ..... day of ....., 1973.

.....
Notary Public.

By ----------
Date ----------
Amount ----------
FOR OFFICIAL
USE ONLY

COPY

ARTICLES OF INCORPORATION

of

THE WARREN COUNCIL FOR ECONOMIC OPPORTUNITY, INC.

The undersigned, a majority of whom are citizens of the United States, desiring to form a corporation, not for profit, under Sections 1702.01 et seq., Revised Code of Ohio, do hereby certify:

FIRST. The name of said corporation shall be THE WARREN COUNCIL FOR ECONOMIC OPPORTUNITY, INC.

SECOND. The place in Ohio where the principal office of the corporation is to be located is City of Warren, Trumbull County.

THIRD. The purpose or purposes for which said corporation is formed are:

(1) To do all things necessary or proper to aid in eliminating poverty in Trumbull County, Ohio, directly or through other organizations;

(2) To coordinate efforts of local government units, especially the City of Warren, the Warren Board of Education, Trumbull County and others, and private agencies, in programs devised under, or which shall be devised under the Economic Opportunity Act of 1964;

(3) To study, plan, encourage, contract for, and administer programs aimed at increasing opportunities for the victims of poverty; to receive, administer, and disburse funds from whatever source received for these purposes; to employ and make available professional staff services for such purposes;

(4) Either directly or indirectly, and either alone or in conjunction or cooperation with other persons, institutions

and organizations of any sort or nature, to do any and all lawful acts and things, and to engage in any and all lawful activities which may be necessary or appropriate in connection with one or more of such purposes;

(5) In general, to do all things and to exercise all rights and powers permitted to non-profit charitable corporations organized under the laws of the State of Ohio to foster or attain one or more of such purposes.

In carrying out its purposes and in exercising its powers, the Corporation shall be subject to the limitations that (a) no part of its net earnings shall inure to the benefit of any private shareholder or individual, (b) no part of its activities shall be carrying on propaganda, or otherwise attempting, to influence legislation, or the advocacy of, or campaigning for, objectives which can only be obtained by legislation or the defeat of proposed legislation, (c) it shall not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office, and (d) the Corporation shall not engage in any activities which would cause the Corporation to fail to qualify under Section 501(c)(3) of the U.S. Internal Revenue Code or successor provisions thereto.

EXHIBIT "A"

Corporation Number 339272
Approved IW)CC—
Date 6/24/70
Fee $1.00
FOR OFFICIAL
USE ONLY
160-134

STATEMENT OF CONTINUED EXISTENCE

The Warren Council for Economic Opportunity, a corporation not for profit organized under the provisions of Chapter 1702 of the Revised Code, (or previous laws, or under special provisions of the Revised Code, or created prior to September 1, 1851 and having elected to be gov-

erned by subsequent laws and whose articles or other documents are filed with the Secretary of State), and not specifically exempted by this section, makes the following verified statement to the Secretary of State:

1. Corporation name the Warren Council for Economic Opportunity, Inc.

2. Location of principal office Warren, Ohio Trumbull County

3. Date of incorporation April 7, 1965 Filed April 7, 1975

4. The corporation is still actively engaged in exercising its corporate privileges.

5. a. Name of statutory agent William P. McLain

b. Address of agent 391 Mahoning Avenue, N.W., Warren, Ohio 44483

IN WITNESS WHEREOF, said the Warren Council for Economic Opportunity, Inc. has caused this statement to be executed by an officer (trustee, three members in good standing) duly authorized in the premises, this 22nd day of June, 1970.

THE WARREN COUNCIL FOR ECONOMIC OPPORTUNITY, INC.
(Name of Corporation)

By LES PATEMAN
(Title) *Chairman, Board of Trustees.*
Filing Fee: $1.00

EXHIBIT "B"

B685 548
Receipt and Certificate No. 12608
THE WARREN COUNCIL FOR ECONOMIC OPPORTUNITY, INC.

No. 339252

Domestic Corporations
- Articles of Incorporation
- Amendment
- Merger/Consolidation

Miscellaneous Filings
- Annexation/Incorporation —City or Village
- Reservation of Corporate

Domestic Corporation—Cont.
- Dissolution
- Agent
- Re-instatement
- Certificates of Continued Existence
- Miscellaneous

Foreign Corporations
- License
- Amendment
- Surrender of License
- Appointment of Agent
- Change of Address of Agent
- Change of Principal Office
- Re-instatement
- Form 7
- Penalty

Miscellaneous Filings—Cont.
- Names
- Registration of Name
- Registration of Name Renewals
- Registration of Name— Change of Registrants Address
- Trade Mark
- Trade Mark Renewal
- Service Mark
- Service Mark Renewal
- Mark of Ownership
- Mark of Ownership Renewal
- Equipment Contract/ Chattel Mortgage
- Power of Attorney
- Service of Process
- Miscellaneous
- Assignment—Trade Mark, Mark of Ownership, Service Mark, Registration of Name

I certify that the attached document was received and filed in the office of TED W. BROWN, Secretary of State, at Columbus, Ohio on the 24th day of June A.D. 1970, and recorded on Roll B685 at Frame 548 of the RECORDS OF INCORPORATION and MISCELLANEOUS FILINGS.

TED W. BROWN,
Secretary of State.

Filed by and Returned To: Warren-Trumbull Council for Economic Opportunity, 206 Pine, S.E., Warren, Ohio 44481.
Fee received: $1.00.
Name:
THE WARREN COUNCIL FOR ECONOMIC OPPORTUNTIY, INC.

In the United States District Court for the Northern District of Ohio, Eastern Division
Civil Action No. C72-260-Y
Judge Leroy J. Contie, Jr.

JOSEPH V. ORLEANS, ET AL., PLAINTIFFS
vs.
UNITED STATES OF AMERICA, DEFENDANT

Affidavit

Personally appeared before me JOHN L. BRECKENRIDGE, who after first being duly sworn upon his oath, says that he is and has been an attorney at law and a resident of Trumbull County, Ohio, for a considerable period of time before 1965; that following the enactment of the Economic Opportunity Act of 1964 by the Legislature of the United States and the creation of the Office of Economic Opportunity, the Affiant was active in the formation and management of the Warren Council for Economic Opportunity, Inc., serving at various times both as president and member of the Board of Trustees, and was regularly in attendance at meetings from the time before the corporation was formed until after November 20, 1968.

That the corporation was formed for the purpose of obtaining funds made available through the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the United States by carrying out the purposes of the Economic Opportunity Act. The corporation was carefully organized and the by-laws and regulations tailored to come within the restrictions of the Economic Opportunity Act.

After the organization of the Warren Council for Economic Opportunity, Inc., it was funded almost totally by Federal funds made available through the Economic Opportunity Act, the only exception being some credit that may have been given for "in kind" services rendered by local citizens. Its management and operation were under

the direct supervision of the Regional Director of the Office of Economic Opportunity in Chicago.

The projects undertaken were those suggested by the Economic Opportunity Act or the directives of the Economic Opportunity Administration.

One of the projects undertaken by the Warren Council for Economic Opportunity, Inc., was the Westlawn Neighborhood Opportunity Center, which project was set up in accordance with the provisions of the Economic Opportunity Act of 1964 and more specifically, that portion at 42 U.S. Code Annotated, Section 2811, which reads as follows:

> The director shall encourage the development of neighborhood centers designed to promote the effectiveness of needed services in such fields as * * * child and economic development * * *

And also, the provisions of 42 U.S.C.A., Sections 2701 et seq.

The Affiant says that from the time of the organization of the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center, the Warren Council for Economic Opportunity, Inc. and Westlawn Neighborhood Opportunity Center acted as agencies to serve and assist the poor in the methods and manners outlined and prescribed by the Economic Opportunity Act and numerous instructions, restrictions and requirements of the Director of the Office of Economic Opportunity. These instructions and requirements directed the manner in which the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center be organized, the classes of persons who were to be employed as directors or serve as trustees, the nature and purpose of the projects to be undertaken and the methods for carrying out such projects. Before funding was granted, the United States of America, through the Office of the Director of Economic Opportunity and his regional directors, was required to approve projects and the outlined approach for conducting them. After a project was approved, its operation was supervised by the Office of the Regional Directors in Chicago.

Without the Economic Opportunity Act and the funds made available thereunder, the Warren Council for Economic Opportunity, Inc. would not have been created and could not have operated or existed.

Further the Affiant sayeth naught.

.....

JOHN L. BRECKENRIDGE.

State of Ohio
County of } *ss:*

SWORN TO before me and subscribed in my presence this ..... day of ....., 1973.

.....

Notary Public.

In the United States District Court for the Northern District of Ohio, Eastern Division
Civil Action No. C72-260-Y
Judge Leroy J. Contie, Jr.

JOSEPH V. ORLEANS, ET AL., PLAINTIFFS
vs.
UNITED STATES OF AMERICA, DEFENDANT
Affidavit

Personally appeared before me SIDNEY I. ROBERTS, who after first being duly sworn and affirmed, says that in October of 1972, he was appointed directly by the Regional Office of the Office of Economic Opportunity to be chairman of the governing board of The Warren-Trumbull Council for Economic Opportunity and that he was asked by the Chicago Regional Office to re-organize the Warren-Trumbull Council for Economic Opportunity. Presently, he has custody of the records of the Warren-Trumbull Council for Economic Opportunity and portions of certain of these records are attached hereto.

Further, the Affiant says that presently the entire funding of the Warren-Trumbull Council for Economic Opportunity is by funds of the United States except for some so-called "in kind" contributions, and that to his knowledge this is and has been the case throughout the history of the Warren-Trumbull Council for Economic Opportunity.

Further, the Affiant sayeth naught.

.....

SIDNEY I. ROBERTS.

State of Ohio
County of Mahoning } *ss:*

SWORN TO before me and subscribed in my presence this ..... day of ....., 1973.

.....

Notary Public.

[Attachments omitted because of bulk]

Supreme Court of the United States
No. 75-328

UNITED STATES, PETITIONER
v.
JOSEPH V. ORLEANS, ET AL.

Order Allowing Certiorari

Filed October 20, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
SEP 29 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-328

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOSEPH V. ORLEANS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Supreme Court of the United States

October Term, 1975
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals for the Sixth Circuit are fully presented in the Brief for the Petitioner. The opinion of the Court of Appeals is reported at 509 F.2d 197.

JURISDICTION

The jurisdictional requisites adequately appear in the Brief for the Petitioner.

COUNTER STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Whether the Warren-Trumbull Council for Economic Opportunity, a Community Action Agency which was organized for the sole purpose of receiving funds from the Office of Economic Opportunity pursuant to the Economic Act of 1964, which received all of its cash funds from the OEO (as a grantee, not a contractor), and which was closely regulated and supervised thereby, is a "corporation primarily acting as, instrumentality or agency of the United States" and not a contractor with the Federal Government so as to make the United States liable for the torts thereof, pursuant to the Federal Tort Claims Act.

COUNTER STATEMENT OF THE CASE

This is an action brought pursuant to the Federal Tort Claims Act to recover money damage caused respondents by reason of personal injuries and loss of services, resulting from an automobile accident which occurred on September 3, 1970, in the vicinity of Conneaut Lake in Mercer County, Pennsylvania. Joseph V. Orleans, the minor respondent, was injured, which resulted in the amputation of his right arm, when the automobile in which he was a passenger left the road and struck a parked truck. The automobile was driven by Robert Walker, acting as a temporary employee and driver for the Westlawn Neighborhood Opportunity Center, an activity of the Warren-Trumbull Council for Economic Opportunity, Inc. (hereinafter referred to as WTCEO). The automobile was at the time filled with children returning from an outing organized and sponsored by this agency.

Following the filing of the complaint and an answer thereto, petitioner United States of America filed a motion for summary judgment on the theory that the WTCEO was not a "federal agency" within the meaning of that term as defined in 28 U.S.C. Par. 2671. Extensive discovery was undertaken by the respondents and depositions and affidavits were filed by them in opposition to the motion for summary judgment.

The affidavits and depositions submitted by the respondents, together with the regulations promulgated by the Office of Economic Opportunity, when taken together, reveal that the WTCEO was organized for the sole purpose of receiving OEO grant funds, had no other funds, and was directly and immediately controlled and supervised by the regional office of the OEO. The ultimate power of control exercised by the regional office of the OEO was demonstrated by its dissolution of the board and termination of the agency and its later appointment of Dr. Sidney I. Roberts to act as chairman and reorganize the agency. (Affidavits of Sidney I. Roberts and John L. Breckenridge are included in Appendix.)

Hundreds of pages of regulations outline programs which may properly be carried out and the manner in which they must be carried out. These regulations were presented in evidence. They, along with the various affidavits, showed that in actuality, so far as this particular community action agency was concerned, it acted solely for the purpose of carrying out the programs specified by Congress in the Economic Opportunity Act. During the conduct of these programs, it was closely supervised by the regional office of the Office of Economic Opportunity. The board of directors was selected as specified by the Economic Opportunity Act to consist of membership including one-third local representatives of government, one-

third local representatives of the community, and one-third local representatives of the area to be served.

The only thing offered by the petitioner was the affidavit of Wendall Verduin, regional director of the Office of Economic Opportunity, Chicago Regional Office. In that affidavit, he stated that WTCEO was granted funds by the OEO for the conduct of community action programs. The affidavit did not state that there was a contract between the United States and the WTCEO, nor was anything that purported to be a contract offered by the petitioner. The Economic Opportunity Act specifically provides that funds may be dispersed to a "grantee, contractor or sponsor of projects appropriate. . .", 42 U.S.C. Par. 2795 (a). The affidavit of Mr. Verduin stated that WTCEO was a grantee.

REASONS FOR DENYING THE WRIT

1. The first reason urged by the petitioner for the granting of the writ is that the decision of the Circuit Court of Appeals departs from the principles set forth by this Court in *Logue v. United States*, 412 U.S. 521. The *Logue* case involved the liability of the United States under the Federal Tort Claims Act for injuries to a prisoner while confined to a county jail pursuant to a contract between the County and the Federal Bureau of Prisons. This contract was entered into in accordance with 18 U.S.C. Par. 4002, authorizing such contracts and providing in the most general terms for the rates to be charged and conditions required of the jail. The Court held that the county was an independent contractor and there was no liability by reason of its acts or those of its employees, though pointing out that the United States might still be liable for negligence of its marshals.

In the *Logue* case there was first of all a contract. Secondly, there was no exercise of control over the county jail other than the general requirement in the contract that the county provide "reasonably decent, sanitary, and healthful quarters and subsistence."

This is far different from the situation in the instant case where no contract as such existed and where funds were turned over to a corporation which existed solely for the purpose of securing such funds and carrying out the programs enacted by Congress under the supervision and guidelines provided by the Office of Economic Opportunity.

2. The second reason set forth by the petitioner for the granting of the writ is that this case is in direct conflict with the decision of the Eighth Circuit in *Vincent v. United States*, 513 F.2d 1296. The facts as stated in the *Vincent* case were different than the facts in this case. In this case, extensive control over WTCEO was actually exercised by the regional office of the OEO. The evidence supporting respondents' position established that the regional Office of Economic Opportunity disbanded the agency at one time and then at a later time appointed a chairman to reorganize the agency. The only facts stated in the *Vincent* case opinion are:

> "The district court carefully reviewed this question and concluded that Mid-Delta was separate and distinct from the United States and the Office of Economic Opportunity and that federal control over Mid-Delta was insufficient to cause it to be considered an agency or instrumentality of the federal government within the meaning of the Federal Tort Claims Act."

This may well have been the situation in the *Vincent* case. Clearly it was not in this case, where the agency was created and existed solely for the purpose of carrying

out the programs specified by Congress in the Economic Opportunity Act and was subject to the control of the Office of Economic Opportunity for its very existence. If the statement of the circuit court in the *Vincent* case is accurate, the facts must be different.

The opinion of the circuit court in this case contains a detailed factual statement plus a thoughtful and well reasoned opinion. The decision in *Vincent* neither contains an analysis of the facts or any legal reasoning to support its conclusion.

CONCLUSION

The decision of the circuit court in this case is not in conflict with the decision of this Court in *Logue v. United States*, nor is it in conflict with the case of *Vincent v. United States*, when the facts are carefully considered.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

AFFIDAVIT OF SIDNEY I. ROBERTS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed in U. S. District Court, June 28, 1973)

Personally appeared before me Sidney I. Roberts, who after first being duly sworn and affirmed, says that in October of 1972, he was appointed directly by the Regional Office of the Office of Economic Opportunity to be chairman of the governing board of The Warren-Trumbull Council for Economic Opportunity and that he was asked by the Chicago Regional Office to reorganize the Warren-Trumbull Council for Economic Opportunity. Presently, he has custody of the records of the Warren-Trumbull Council for Economic Opportunity and copies of certain of these records are attached hereto.

Further, the Affiant says that presently the entire funding of the Warren-Trumbull Council for Economic Opportunity is by funds of the United States except for some so-called "in kind" contributions, and that to his knowledge this is and has been the case throughout the history of the Warren-Trumbull Council for Economic Opportunity.

Further, the Affiant sayeth naught.

/s/ Sidney I. Roberts

(Jurat omitted in printing)

AFFIDAVIT OF JOHN L. BRECKENRIDGE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed in U. S. District Court, June 28, 1973)

Personally appeared before me John L. Breckenridge, who after first being duly sworn upon his oath, says that he is and has been an attorney at law and a resident of Trumbull County, Ohio, for a considerable period of time before 1965; that following the enactment of the Economic Opportunity Act of 1964 by the Legislature of the United States and the creation of the Office of Economic Opportunity, the Affiant was active in the formation and management of the Warren Council for Economic Opportunity, Inc., serving at various times both as president and member of the Board of Trustees, and was regularly in attendance at meetings from the time before the corporation was formed until after November 20, 1968.

That the corporation was formed for the purpose of obtaining funds made available through the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the United States by carrying out the purposes of the Economic Opportunity Act. The corporation was carefully organized and the by-laws and regulations tailored to come within the restrictions of the Economic Opportunity Act.

After the organization of the Warren Council for Economic Opportunity, Inc., it was funded almost totally by Federal funds made available through the Economic Opportunity Act, the only exception being some credit that may have been given for "in kind" services rendered by local citizens. Its management and operation were under the direct supervision of the Regional Director of the Office of Economic Opportunity in Chicago.

The projects undertaken were those suggested by the Economic Opportunity Act or the directives of the Economic Opportunity Administration.

One of the projects undertaken by the Warren Council for Economic Opportunity, Inc. was the Westlawn Neighborhood Opportunity Center, which project was set up in accordance with the provisions of the Economic Opportunity Act of 1964 and more specifically, that portion at 42 U.S. Code Annotated, Section 2811, which reads as follows:

> "The director shall encourage the development of neighborhood centers designed to promote the effectiveness of needed services in such fields as . . . child and economic development. . ."

And also, the provisions of 42 U.S.C.A., Sections 2701 et seq.

The Affiant says that from the time of the organization of the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center, the Warren Council for Economic Opportunity, Inc. and Westlawn Neighborhood Opportunity Center acted as agencies to serve and assist the poor in the methods and manners outlined and prescribed by the Economic Opportunity Act and numerous instructions, restrictions and requirements of the Director of the Office of Economic Opportunity. These instructions and requirements directed the manner in which the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center be organized, the classes of persons who were to be employed as directors or serve as trustees, the nature and purpose of the projects to be undertaken and the methods for carrying out such projects. Before funding was granted, the United States of America, through the Office of the Director of Economic Opportunity and his regional direc-

tors, was required to approve projects and the outlined approach for conducting them. After a project was approved, its operation was supervised by the Office of the Regional Directors in Chicago.

Without the Economic Opportunity Act and the funds made available thereunder, the Warren Council for Economic Opportunity, Inc. would not have been created and could not have operated or existed.

Further the Affiant sayeth naught.

/s/ John L. Breckenridge

(Jurat omitted in printing)

Supreme Court, U.S.
FILED
DEC 8 1975
MICHAEL RODAK, JR., CLERK

No. 75-328

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH V. ORLEANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is reported at 509 F. 2d 197. The opinions and order of the district court (Pet. App. 17a–27a) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on January 13, 1975. A timely petition for rehearing was denied on April 2, 1975. On June 23, 1975, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including July 31, 1975. On July 23, 1975, a further

extension was granted by Mr. Justice Marshall to and including August 30, 1975. The petition for a writ of certiorari was filed on that date and was granted on October 20, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employee of a community action agency that receives funding under the Economic Opportunity Act of 1964 is an "employee of the government" within the meaning of the Federal Tort Claims Act.

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2671:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.
>
> * * * * *

STATEMENT

1. Pursuant to Title II of the Economic Opportunity Act of 1964, 78 Stat. 516, as amended, 42 U.S.C. 2781 *et seq.*, the federal government, acting through the Community Services Administration (formerly the Office of Economic Opportunity), furnishes financial assistance for "community action programs" undertaken by "community action agencies." The Act defines a community action agency as a "State or political subdivision of a State * * * or * * * public or private nonprofit agency or organization which has been designated by a State or * * * political subdivision * * * which * * * is determined to be capable of planning, conducting, administering and evaluating a community action program * * *" (42 U.S.C. 2790(a)). In turn, "community action program" is defined as a program that pro-

vides "a range of services and activities having a measurable and potentially major impact on the causes of poverty in the community * * *" (*ibid.*).

The Act places a variety of restrictions on the kind of organization that may receive funding as a community action agency. For example, the organization's governing board must be representative of the interests of the community to be served;[1] the organization is required to assume several broadly defined responsibilities in connection with the operation of its community action program (42 U.S.C. 2795 (b)); it is required to observe administrative standards "which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this [Act]" (42 U.S.C. 2796(a)).

But the Act also puts substantial emphasis on local control over community action programs and on the "maximum feasible participation of residents of the areas and members of the groups served" (42 U.S.C. 2781(a)(4)). A community action agency is encouraged to initiate programs other than those for which the federal government provides funds (42 U.S.C. 2795(b)(2)). Each community action agency must secure at least 20 percent of its own support from sources other than federal funds (42 U.S.C. 2812(c)).

[1] 42 U.S.C. 2791(b) provides that one-third of the governing board's members must be public officials, one-third must represent the poor in the area served, and the remaining members must be representative of business, labor, religious, welfare, education or other major interest groups in the community. See also 42 U.S.C. 2791(c).

The federal government is barred from establishing "binding national priorities" for the use of funds made available under the Act (42 U.S.C. 2808(e)). The governing board of each community action agency (which may not include any employee of the Community Services Administration; 45 C.F.R. 1015.735–19) has full authority "to appoint persons to senior staff positions, to determine major personnel, fiscal, and program policies, [and] to approve overall program plans and priorities" (42 U.S.C. 2791(e)).

2. The Warren-Trumbull Council for Economic Opportunity, Inc., is an Ohio corporation authorized to receive federal funds as a community action agency (Pet. App. 1a, 6a).[2] The Council's charter enumerates five corporate purposes, only one of which is the receipt of federal funds to operate community action programs (Pet. App. 18a). The Council was entitled to, but did not, gather support from other sources and devote itself to other goals. It did, however, acquire through in-kind services furnished by the community the 20 percent local support required by 42 U.S.C. 2812(c) (Pet. App. 24a–25a). The Council selected and carried out a variety of programs, all of which were funded by the federal government.

The Westlawn Neighborhood Opportunity Center is one of the Council's activities (Pet. App. la). Respondent Joseph V. Orleans, a minor, was injured in an automobile accident while returning from an outing sponsored by Westlawn (*ibid.*). The driver of the

[2] The Council was designated as a community action agency by the City of Warren and County of Trumbull, Ohio (Pet. App. 18a, 22a–24a).

automobile in which respondent was riding was another minor who also had attended the outing (*id.* at 1a–2a). Employees of the Council had arranged for respondent to ride in that car (*ibid.*).

3. Respondent Joseph Orleans, through his father, brought this suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, alleging that "the agents of the United States of America in charge of [the Westlawn] outing were negligent in the organization and supervision of said outing * * *" (A. 5) and requesting $1,000,000 in damages (ibid.).[3]

The United States moved for summary judgment on the ground that the Council is not an agency or instrumentality of the United States and therefore its employees are not "employees of the Government" within the purview of the Tort Claims Act (A. 7-8). The district court granted the motion (Pet. App. 17a–21a).

On reconsideration the district court stated (Pet. App. 23a) that it "accepts the four basic facts upon which [respondents] base their conclusion" (Pet. App. 22a–23a):

> First, the Warren-Trumbull Council for Economic Opportunity, Inc. was created for the purpose of carrying out the community action programs contained in the Economic Opportunity Act of 1964. Second, the Warren-Trumbull Council and its activity, the Westlawn Neighborhood Opportunity Center, received funds from no source other than the Office of Economic Opportunity. Third, the Council conducted no programs other than those formulated and funded by the federal government. Fourth, the Office of Economic Opportunity and its regional office in Chicago exercised close supervision over the Council and its activities.

These four facts, the court held, do not make the Council an agency or instrumentality of the government because (1) the Council itself retains day-to-day control over its activities, (2) the Council itself decided which programs to operate and whether and how to implement them, and (3) the Council retains the option to receive funds from other sources and to administer programs outside the federal purview. The court wrote (Pet. App. 25a):

> The fact that the Council did not receive funds from sources other than the Federal Government whether through passive inaction or through affirmative action should not create a liability on the part of the United States when Congress did not intend the United States to be the sole source of such funds.

The court concluded that the Council was an independent contractor with the United States. Recognizing that a community action agency is entitled to be even more independent than an independent contractor—in other words, that most community action programs are "grantees" of federal funds—the district court reasoned (Pet. App. 27a):

> * * * [W]hile [the Council] does not institute its own projects, it is empowered to do so by its charter and is encouraged to do so by Congress. * * * [I]nstead of becoming an independent organization carrying on programs

[3] Joseph Orleans' father requested an additional $100,000 in damages (A. 6).

> initiated and funded by a variety of sources as envisaged by Congress, the Warren-Trumbull Council for Economic Opportunity, Inc. has become, in effect, an organization to contract with the Office of Economic Opportunity for Federal funds to run prepackaged Federal programs * * *.

4. The court of appeals reversed and remanded for trial. The court acknowledged that *Logue* v. *United States*, 412 U.S. 521, had held (1) that the Tort Claims Act invokes the "traditional distinction between employees of the principal and employees of an independent contractor" (Pet. App. 9a) and (2) that, under the traditional distinction, "[o]nly if the principal has the right to supervise the 'physical performance' of the work of such employees do they become employees of the principal" (*ibid.*). The court of appeals also acknowledged (Pet. App. 12a):

> The relationship between OEO and WTCEO meets a number of the criteria for establishing that WTCEO is an independent contractor. There was no showing that OEO controlled or supervised the physical performance of the work of employees of WTCEO and Westlawn. Moreover, the requirements imposed on these local agencies by statute and regulations are not concerned with the details of the day-to-day operations of the agencies or the programs which they carry on in the Warren-Trumbull County area. They are more in the nature of general instructions to be followed in order to assure that certain policies which Congress had adopted in establishing OEO are respected and adhered to.

The court nevertheless held that "resort to the traditional tests of the principal-contractor/employee relationship" (Pet. App. 16a) was inappropriate where the plaintiff was an intended beneficiary of a community action program and where the federal government retained, through the use of "guidelines" and prior approval, some control over the programs offered by the community action agency. Reasoning that both the Tort Claims Act and the Economic Opportunity Act "were designed to remedy conditions which caused hardship and human suffering" (Pet. App. 14a), the court concluded that Congress must have intended to make the government liable for any negligence of an employee of a community action agency that causes injury to an intended beneficiary who is "engaged in approved programs" (Pet. App. 15a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Tort Claims Act partially waives the sovereign immunity of the United States, subjecting the government to liability to the same extent as a private party for the torts its employees may commit in the course of their duties. *Dalehite* v. *United States*, 346 U.S. 15, 24–30. The Act does not, however, subject the United States to liability for the tortious acts of all individuals who may be engaged in programs Congress believes beneficial. The Act confers jurisdiction upon district courts only to entertain civil actions for money damages for injuries "caused by the negligent or wrongful act or omission of any em-

ployee of the Government while acting within the scope of his office or employment * * *" (28 U.S.C. 1346(b)). The Act defines "[e]mployee of the government" as including officers and employees of "any federal agency" (28 U.S.C. 2671) but provides that "federal agency" does not include "any contractor with the United States" (*ibid.*).

In *Logue* v. *United States,* 412 U.S. 521, this Court held that the United States is not liable for the negligence of employees of jails with which the federal government contracts for the safekeeping of federal prisoners. The Court there recognized that "the 'contractor with the United States' language of § 2671 adopts the traditional distinction between employees of the principal and employees of an independent contractor with the principal, and * * * that the critical factor in making this determination is the authority of the principal to control the detailed physical performance of the contractor" (412 U.S. at 527–528). Performance by a contractor of work that otherwise would have been performed by an employee of the government does not make the contractor a federal agency or its employees federal employees, the Court held, because then "the exclusion of contractors from the definition of 'Federal agency' in § 2671 would be virtually meaningless, since it would be a rare situation indeed in which an independent contractor with the Government would be performing tasks that would not otherwise be performed by salaried Government employees" (*id.* at 532).

Under the test articulated in *Logue,* a community action agency is not an agency or instrumentality

of the United States. As the court of appeals explicitly stated, "[t]here was no showing that OEO controlled or supervised the physical performance of the work of employees of [the Council] and Westlawn" (Pet. App. 12a). Since the federal government does not "control the detailed physical performance of" community action agencies, they are not federal agencies, and their employees are not "employee[s] of the Government" within the meaning of the Federal Tort Claims Act.

ARGUMENT

EMPLOYEES OF COMMUNITY ACTION AGENCIES THAT RECEIVE FUNDS UNDER THE ECONOMIC OPPORTUNITY ACT OF 1964 ARE NOT FEDERAL EMPLOYEES WITHIN THE MEANING OF THE FEDERAL TORT CLAIMS ACT

A. COMMUNITY ACTION AGENCIES ARE NOT SUBJECT TO DAY-TO-DAY CONTROL BY THE UNITED STATES

The first community action agencies were locally-organized private groups dedicated to the amelioration of poverty. These groups raised funds from local corporations and benefactors, from projects they initiated, from state and local governments, and from foundation grants. See generally Marris & Rein, *Dilemmas of Social Reform: Poverty and Community Action in the United States* 7–32 (1967); Moynihan, *Maximum Feasible Misunderstanding: Community Action in the War on Poverty* 1–127 (1969); Kravitz, *The Community Action Program—Past, Present, and Its Future?,* in *On Fighting Poverty* 52–69 (Sundquist ed. 1969).

The Economic Opportunity Act of 1964 was proposed to Congress as a package of programs, one of which was intended to provide an additional source of funds—the federal government—upon which local groups dedicated to community action could call. President Johnson's special message to Congress, transmitting the legislation that became the Economic Opportunity Act of 1964, described community action as a program designed to "give every American community the opportunity to develop a comprehensive plan to fight its own poverty—and help them to carry out their plans." 1 *Public Papers of the Presidents: Lyndon B. Johnson, 1963–1964,* 377 (G.P.O. 1965). The message continued (*id.* at 378):

> This program asks men and women throughout the country to prepare long-range plans for the attack on poverty in their own local communities.
>
> These are not plans prepared in Washington and imposed upon hundreds of different situations.
>
> They are based on the fact that local citizens best understand their own problems, and know best how to deal with those problems.
>
> These plans will be local plans striking at the many unfilled needs which underlie poverty in each community, not just one or two. Their components and emphasis will differ as needs differ.
>
> These plans will be local plans calling upon all the resources available to the community—federal and state, local and private, human and material.

Congress well understood the nature of the program for which it was providing federal money. The House committee report stated that, with respect to

community action agencies, "the role of the Federal Government will be to give counsel and help, *when requested,* and to make available substantial assistance in meeting the costs of those programs." H.R. Rep. No. 1458, 88th Cong., 2d Sess. 10 (1964) (emphasis in original). The Senate report is to the same effect. See S. Rep. No. 1218, 88th Cong., 2d Sess. 18 (1964).

The congressional statement of purpose relates (42 U.S.C. 2781(a)) that the "basic purpose" of the Act "is to stimulate a better focusing of all available local, State, private, and Federal resources upon the goal of" enabling low-income individuals "to become fully self-sufficient." The "specific purposes" of the Act include (42 U.S.C. 2781(a)(1)) "the strengthening of community capabilities for planning and coordinating Federal, State, and other assistance related to the elimination of poverty, so that this assistance, through the efforts of local officials, organizations, and interested and affected citizens, can be made more responsive to local needs and conditions;" and (42 U.S.C. 2781(a)(4)) "the development and implementation of all programs and projects designed to serve the poor or low-income areas with the maximum feasible participation of residents of the areas and members of the groups served * * *."

In order to achieve these goals the Act shields community action agencies from significant federal control. The Act forbids the establishment of "binding national priorities" (42 U.S.C. 2808(e)). In order to ensure that local community action agencies will be able to draw upon non-federal sources of support, the Act requires that all community action agencies

have charters allowing them to receive and administer funds from private and local public sources (42 U.S.C. 2795(a)).

The control of the programs to be carried out by a community action agency is vested in the board of directors of that agency. The board itself is free of federal control. 42 U.S.C. 2791(c) provides that the boards of directors of community action agencies are fully responsible for the operation of community action programs, and 42 U.S.C. 2791(b) provides that those boards of directors must be selected from the local community and interests to be served by the programs. The Community Services Administration has completed the statutory plan by providing that no Community Services Administration employee can serve on the board of any community action agency receiving federal funds. 45 C.F.R. 1015.735–19. The board of directors also has full authority over the day-to-day operations of the community action agency.

In sum, under the Act a community action agency is a local entity that receives federal assistance to carry out locally chosen and locally controlled programs. Federal involvement is limited to financial aid, guidance when requested, and oversight to protect against misapplication of funds (see 42 U.S.C. 2796 and 2835).

As a result of the freedom of operation established by these rules, many community action agencies became quite independent indeed.[4] The very independ-

[4] See Moynihan, *supra*, at pp. 128–166; Wofford, *The Politics of Local Responsibility: Administration of the Community Action*

ence of community action agencies led to repeated attempts in Congress to exert greater federal control over local agencies or to abolish the provision of federal money for community action programs.[5] Although Congress made some changes in the program, and although the administration of community action programs has been transferred from the Office of Economic Opportunity to the Community Services Administration, the basic guarantees of local independence are, and have been since 1964, as we have described them above.

B. BECAUSE COMMUNITY ACTION AGENCIES ARE NOT SUBJECT TO DAY-TO-DAY CONTROL OF THE FEDERAL GOVERNMENT, THEY ARE NOT FEDERAL AGENCIES

The Federal Tort Claims Act confers jurisdiction upon the district courts to entertain civil actions for money damages for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *" (28 U.S.C. 1346(b)). The Act defines "employee of the Government" as including officers and employees of "any federal agency" (28 U.S.C. 2671) but provides that the term "federal agency" does not include "any contractor with the United States" (*ibid.*). This Court in *Logue* v. *United States,* 412 U.S. 521, set forth guidelines for distin-

Program—1964–1966, in *On Fighting Poverty*, *supra*, at pp. 70–102; Farrel, *The View From the City: Community Action in Trenton*, in *id.* at pp. 127–157.

[5] See generally Selover, *The View from Capitol Hill: Harassment and Survival*, in *On Fighting Poverty*, *supra*, at pp. 158–187.

guishing between a "federal agency" and a "contractor" for purposes of the Federal Tort Claims Act.

The question in *Logue* was whether the United States is liable under the Act for the negligence of employees of local jails with which the federal government contracts for the short-term safekeeping of federal prisoners. In applying the Act, the Court recognized that the reference to "contractor with the United States" implicates "the traditional distinction between employees of the principal and employees of an independent contractor with the principal, and * * * that the critical factor in making this determination is the authority of the principal to control the detailed physical performance of the contractor" (412 U.S. at 527–528). The Court determined that the federal government did not possess or exercise any power of supervision of the physical performance of the work of the employees of the local jails and concluded that the United States therefore was not liable for their negligence.

In short, the Court held in *Logue* that the touchstone for determining whether an entity is a federal agency for purposes of the Federal Tort Claims Act is whether that entity is subject to the day-to-day control of the government. As we have demonstrated, a community action agency is guaranteed considerable latitude in its day-to-day operations. Indeed, a community action agency has far more latitude than did the local jail that the Court considered in *Logue*.

Under the contract in *Logue,* the objective to be achieved—the safekeeping of federal prisoners—was one chosen by the federal government. Federal em-

ployees were entitled to give, and did give, directions to the local jail concerning how this objective was to be accomplished (412 U.S. at 529–530):

> The county undertakes to provide custody in accordance with the Bureau of Prisons' "rules and regulations governing the care and custody of persons committed" under the contract. These rules in turn specify standards of treatment for federal prisoners, including methods of discipline, rules for communicating with attorneys, visitation privileges, mail, medical services, and employment. [And] the agreement * * * reserves to the United States * * * "the right to enter the institution * * * at reasonable hours for the purpose of inspecting the same and determining the conditions under which federal offenders are housed."

Here, by contrast, the community action agency has control over the goals it will pursue and the combinations of programs it will select in an attempt to achieve its objectives. The community action agency does not promise the federal government that its endeavors will be "successful," nor is the agency penalized for lack of "success." The role of the federal government in this process is quite similar to the role of a philanthropic foundation; the federal government offers financial support to groups that are already doing, or have proposed to do, what the government deems to be beneficial. The federal government helps the groups to initiate, expand, or improve their activities. But it does not direct or control those activities even in broad compass, let alone on a day-to-day basis. It follows that, for purposes of the Federal Tort

Claims Act, a community action agency either is or shares the essential attributes of an "independent contractor," and that its employees are not employees of the government.

The argument we have set out has been accepted by every other court that has considered the issue.[6] The court of appeals itself seemed to recognize the lack of statutory support for its conclusion, for it

[6] See *Vincent* v. *United States*, 383 F. Supp. 471 (E.D. Ark.), affirmed, 513 F. 2d 1296 (C.A. 8), petition for a writ of certiorari pending, No. 75-60; *Hughes* v. *United States*, 383 F. Supp. 1071 (S.D. Iowa); *Prater* v. *United States*, 357 F. Supp. 1044 (N.D. Tex.).

Employees of community action agencies also have been held not to be federal employees for other purposes. See *Hines* v. *Cenla Community Action Committee, Inc.*, 474 F. 2d 1052 (C.A. 5); *Robles* v. *El Paso Community Action Agency*, 456 F. 2d 189 (C.A. 5).

Cf. *United States* v. *Del Toro*, 513 F. 2d 656 (C.A. 2) (an employee of a model cities program receiving federal funds is not a "public official" within the meaning of 18 U.S.C. 201). We mention *Del Toro* without endorsing it; the Department of Justice has taken the position that the legislative history of 18 U.S.C. 201 demonstrates that the term "public official" as there used encompasses some individuals who are not employees of the United States but who are responsible for the administration of federal funds.

In the court of appeals respondents argued that *Maryland* v. *Manor Real Estate and Trust Co.*, 176 F. 2d 414 (C.A. 4), *Schetter* v. *Housing Authority of City of Erie*, 132 F. Supp. 149 (W.D. Pa.), and *Toth* v. *United States*, 107 *F. Supp.* 37 (N.D. Ohio), would support a conclusion that the Council is a federal agency or instrumentality. Those cases, however, which did not involve community action agencies, each turned on the court's determination that the United States possessed day-to-day control over the activities of the "contractor."

agreed (Pet. App. 12a) that the federal government did not maintain close surveillance over the activities of the Council and suggested that the *Logue* test might well be applicable if the injured party were "a member of the general public" (Pet. App. 15a). The court did not attempt to explain how, under any construction of the Federal Tort Claims Act, the question whether an individual is an "employee of the government" could turn upon the identity of the plaintiff.

The court of appeals instead attempted to support its decision by arguing that the Council is a federal agency because it was created in order to take advantage of federal funds and was dependent upon the United States for approximately 80 percent of its support (and all of its financial support). The district court anticipated and correctly answered this argument (Pet. App. 22a–27a). It held that the simple fact that the City of Warren and the County of Trumbull desired their citizens to receive the benefit of available federal money does not suffice to turn the entity they organized into an instrumentality or agency of the United States.[7] The Council's dependence upon federal money was the voluntary choice of the Council; Congress sought to encourage reliance upon non-federal sources and, indeed, upon non-governmental sources.[8] 42 U.S.C. 2795(b)(2) and 2812

[7] Cf. 42 U.S.C. 2790(e), providing that neither the city nor the county was required to establish a community action agency. See also *Baca* v. *United States*, 467 F. 2d 1061 (C.A. 10).

[8] Because the Council possessed substantial independence in setting goals as well as in selecting ways to achieve them, it might

(c). The Federal Tort Claims Act does not permit an entity to turn itself into a federal agency or instrumentality against the will of Congress. Nor does the fact that an entity receives most of its support from the federal government make it an agency or instrumentality of the United States. *Maryland* v. *United States,* 381 U.S. 41, 48.

The court of appeals also relied (Pet. App. 14a) upon the fact that many federal regulations govern or guide various parts of the Council's activities. But this, too, is irrelevant. In *Maryland* the Court held that the Maryland Air National Guard, which was required to "conform to strict federal requirements" (381 U.S. at 48), was not an agency or instrumentality of the United States.[9] See also *Lipka* v. *United States,* 369 F. 2d 288 (C.A. 2), certiorari denied, 387 U.S. 935; *Buchanan* v. *United States,* 305 F. 2d 738 (C.A. 8); *Gowdy* v. *United States,* 412 F. 2d 525 (C.A. 6). Such control as the federal government exercised over the Council amounted to nothing more than a right to ensure that federal funds were being spent properly and for the benefit of the poor.[10]

be possible to argue that the Council was a "grantee." An "independent contractor," this argument would run, possesses control over means but not over ends. Since *Logue* was concerned only with "independent contractors," the argument would conclude, that case does not preclude the possibility that a "grantee" like the Council is an agency or instrumentality of the United States.

We submit that this argument would be incorrect even as to the most independent community action agency. Under the analysis of *Logue* the more independent an entity becomes the less appropriate it is to call such an entity an agency or instrumentality of the United States. But, as the district court correctly perceived, respondents' assault on the Council's independence makes this hypothetical argument unavailable. The fact that the Council depended upon "prepackaged" (Pet. App. 27a) programs would demonstrate only that it had eschewed part of the independence allowed a "grantee" and had become, instead, "an organization to contract with the Office of Economic Opportunity for Federal funds to run * * * Federal programs for the Warren-Trumbull County Area" (*ibid.*)—in other words, that the Council had surrendered some control over ends while retaining control of day-to-day means, thereby becoming an independent contractor.

[9] Cf. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, both of which hold that extensive state regulation of an enterprise does not convert the actions of that enterprise into "state action."

[10] The court of appeals thought it significant that on one occasion the government had ceased federal funding until the Council had been reorganized and a new chairman of the board of directors had been selected. This incident, which did not amount to day-to-day control by the government over the Council's activities, is irrelevant under *Logue* and *Maryland*. *The* "control" exercised was that of general oversight or inspection to ensure that funds were not misused.

What is more, even a complete withdrawal of federal funds could not have forced the Council to cease operating in any manner it wished. The Council was authorized by its charter to obtain funds from sources other than the federal government. Any "control" exercised by the government through the power to terminate funds is not different either in kind or in degree from that exercised by private foundations that threaten to cease funding if conditions deemed necessary to the purposes of the grant are not met. Indeed, the major client of *any* independent contractor can impose sanctions and set conditions by threatening to withdraw its patronage.

C. THE EMPLOYEES OF THE COUNCIL WERE NEITHER "EMPLOYEES OF ANY FEDERAL AGENCY" NOR "PERSONS ACTING ON BEHALF OF A FEDERAL AGENCY IN AN OFFICIAL CAPACITY"

Under 28 U.S.C. 2671 an " '[e]mployee of the government' includes * * * employees of any federal agency * * * and persons acting on behalf of a federal agency in an official capacity * * *." Because, as we have demonstrated above, the Council is not an agency or instrumentality of the United States, its employees are not employees of the government under the first portion of this definition. The court of appeals observed, however, that community action agencies might be special cases because "Congress could have chosen to administer the Economic Opportunity Act directly by establishing local offices of OEO" (Pet. App. 14a). This suggests, however implicitly, that in the view of the court of appeals, the employees of the Council might be "persons acting on behalf of a federal agency"—in this case presumably the Office of Economic Opportunity or the Community Services Administration.

This suggestion is unavailing, for the fact is that Congress chose to make grants to independent local entities rather than to administer the poverty program directly. The situation is analogous to that in *Logue*: if the federal government had not contracted with local jails to hold federal prisoners, employees

of the government would have performed that function directly. The Court rejected Logue's argument that this converted the local jail's employees into "persons acting on behalf of a federal agency" (412 U.S. at 531–532; footnote omitted):

> [W]e are not persuaded that employees of a contractor with the Government, whose physical performance is not subject to governmental supervision, are to be treated as "acting on behalf of" a federal agency simply because they are performing tasks that would otherwise be performed by salaried employees of the Government. If this were to be the law, the exclusion of contractors from the definition of "Federal agency" in § 2671 would be virtually meaningless, since it would be a rare situation indeed in which an independent contractor with the Government would be performing tasks that would not otherwise be performed by salaried Government employees.

This case, in the last analysis, is controlled by the same principle that informed the decision in *Logue*: the United States is not responsibile for the torts of those over whom it lacks effective control. The United States has neither the right nor the ability to select or remove the employees of the Council, nor can the United States control the manner in which those employees go about their tasks. The employees of the

Council accordingly are not employees of the government for purposes of the Federal Tort Claims Act.[11]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1975.

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[11] Our interpretation of the Federal Tort Claims Act is reinforced by the fact that Congress expressly provided that enrollees in the Job Corps (42 U.S.C. 2727(a)(3)) and volunteers in the Volunteers in Service to America program (42 U.S.C. 2994b(b)(2)), two other components of the Economic Opportunity Act of 1964, were to be considered federal employees for purposes of the Federal Tort Claims Act. Although these sections are not conclusive of the intent of Congress, it is reasonable to infer that Congress did not intend to subject itself to Federal Tort Claims Act liability except to the extent specified.

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Supreme Court of the United States

October Term, 1975
No. 75-328

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOSEPH V. ORLEANS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS ON THE MERITS

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Supreme Court of the United States

October Term, 1975
No. 75-328

UNITED STATES OF AMERICA,
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vs.

JOSEPH V. ORLEANS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS ON THE MERITS

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 509 F.2d 197 (6th Cir. 1975). That Court's order denying rehearing is not reported. The opinions and orders of the District Court are not officially reported. The opinions of the District Court and the Court of Appeals are reproduced in the appendix filed in this Court by Petitioner with its Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 13, 1975. A motion for a rehearing and suggestion for a hearing *en banc* was denied on April 2, 1975. The Petition for a Writ of Certiorari was filed August 30, 1975, and was granted on October 20, 1975. The jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. 1346(b):

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2671:

As used in this chapter and sections 1346(b) and 2401 (b) of this title, the term "Federal agency" includes the executive departments, the military departments,

independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

* * * * *

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Warren-Trumbull Council for Economic Opportunity, a Community Action Agency which was organized for the sole purpose of receiving funds from the Office of Economic Opportunity pursuant to the Economic Opportunity Act of 1964, which received all of its cash funds from the OEO, and which was closely regulated and supervised thereby, is a "corporation primarily acting as [an] instrumentalit[y] or agenc[y] of the United States" so as to make the United States liable for the torts thereof pursuant to the Federal Tort Claims Act.

STATEMENT OF THE CASE

A. Introduction.

This is an action brought pursuant to the Federal Tort Claims Act to recover money damage caused Respondents

by reason of personal injuries and loss of services resulting from an automobile accident which occurred on September 3, 1970, in Mercer County, Pennsylvania. Joseph V. Orleans, then fifteen years old, suffered an injury which resulted in the amputation of his right arm when the automobile in which he was a passenger left the road and struck a parked truck. The automobile was filled with children on an outing organized and sponsored by the Westlawn Neighborhood Opportunity Center, an activity of the Warren-Trumbull Council for Economic Opportunity, Inc. (hereinafter referred to as WTCEO). (See generally, Walker Depo., pp. 4, 5, 8 and 10.)

The WTCEO is a non-profit corporation which was organized specifically to become and was at all times relevant a Community Action Agency of the Office of Economic Opportunity (now the Community Services Administration, but herein referred to as OEO) pursuant to Title II of the Economic Opportunity Act of 1964, 78 Stat. 516, as amended, 42 U.S.C. § 2781, et seq. (App. 31 and 36).[1]

Following the filing of a complaint on March 17, 1972, and an answer thereto, Petitioner United States of America filed a motion for summary judgment on the theory that the WTCEO was not a "federal agency" within the meaning of that term as defined in 28 U.S.C. § 2671. Following substantial discovery, District Court Judge Leroy J. Contie, Jr., sustained Petitioner's motion (Pet. App. 17a). Subsequent to a motion for reconsideration filed by Respondents, the Court issued a Memorandum Opinion and Order which affirmed the earlier opinion (Pet. App. 22a).

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1. "App." herein refers to the Joint Appendix. "Pet. App." herein refers to the Appendix which is a part of the Petition for a Writ of Certiorari.

A Notice of Appeal was duly filed with the United States Court of Appeals for the Sixth Circuit. On January 18, 1975, the Sixth Circuit, Pierce Lively, J., reversed the District Court, held that summary judgment improperly had been granted to the United States of America, and remanded the case to the District Court "for further proceedings consistent with this opinion." (Pet. App. 1a-16a).

The Court of Appeals recognized that the WTCEO was created for the purpose of carrying out the community action program of the Economic Opportunity Act of 1964, that it received no funds from sources other than the Office of Economic Opportunity (OEO), that no programs other than those formulated and funded by the federal government were conducted by the WTCEO, and that "even a cursory reading of the voluminous regulations of OEO leaves one with the distinct impression that an organization required to operate in compliance with these guidelines must indeed be a federal instrumentality." (Pet. App. 14a). The Court of Appeals also found highly significant the facts that OEO once stopped funding the WTCEO until the WTCEO reorganized the Council, and that as part of such reorganization, OEO directly appointed the new chairman of the governing board of WTCEO (Pet. App. 12a). Because of these specific facts and other such facts, the Court of Appeals held that summary judgment improperly was granted.

B. The Single Affidavit of Petitioner Was Rebutted By Respondents and an Issue of Fact Exists In This Case.

This litigation comes to this Supreme Court in the procedural posture of summary judgment. Summary judgment may be granted properly only where there exists "no

genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Rule 56, Federal Rules of Civil Procedure). A genuine issue of fact not only exists, but on the evidence before this Court of Appeals it is clear that the WTCEO was a federal agency.

Petitioner contends that the WTCEO was not a federal agency, but in support of this contention Petitioner submitted only one affidavit (App. 8). Moreover, only a single paragraph of that affidavit, paragraph six, addresses itself to the relevant issue. The language in that paragraph is conclusory only and contains no substantive facts to support the conclusions contained therein. In response, Respondents submitted three affidavits and five depositions. These affidavits and depositions detail specific incidents relating to the organization, the daily operation, and the extensive regulation of the WTCEO by the Office of Economic Opportunity. Respondent's submission, together with the regulations Memoranda, Instructions and guidelines promulgated by the Office of Economic Opportunity, when taken together, reveal that the WTCEO was organized for the sole purpose of receiving OEO grant funds, had no funds other than federal funds, and was directly and immediately controlled and supervised in its daily activities by the Regional Office of the OEO.

Taken together, those affidavits, depositions, and the regulatory scheme establish that the WTCEO, on the facts of this case, operated as a "federal agency" as defined by the Federal Tort Claims Act. At the very least, this evidence rebuts Petitioner's single affidavit and establishes that a genuine issue of material fact exists as to whether the WTCEO is a corporation primarily acting as an instrumentality or agency of the United States, and therefore is a "federal agency" as defined in that Act.

C. The WTCEO Was Organized Solely for the Purpose of Receiving OEO Grant Funds and, In Fact, Its Only Funds Were OEO Funds.

The affidavit of William [illegible] McLain, the attorney who incorporated the WTCEO, avers that "the purpose of organizing and incorporating this entity [the predecessor to the WTCEO] was to obtain funds from the Federal Government under the Economic Opportunity Act of 1964 by setting up an agency to act as an instrumentality to carry out the purposes and intentions of the Economic Opportunity Act of 1964." (App. 31). Further, the affidavit of John L. Breckenridge, former president and member of the Board of Trustees of the predecessor to the WTCEO, states that the WTCEO:

> "was formed for the purpose of obtaining funds made available through the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the United States by carrying out the purposes of the Economic Opportunity Act. The corporation was carefully organized and the by-laws and regulations tailored to come within the restrictions of the Economic Opportunity Act." (App. 36-38).

The WTCEO is a non-profit corporation incorporated pursuant to Chapter 1702, Ohio Revised Code (App. 32). Naturally, the articles of incorporation contain numerous provisions which are required by that chapter of the Revised Code. While these provisions may permit the corporation to act as other than a federal agency, the affidavits submitted by Respondents demonstrate that the sole purpose in establishing the WTCEO was to receive federal funds pursuant to the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the federal government.

The affidavits of Mr. Breckenridge (App. 36) and Mr. Sidney I. Roberts (App. 38), chairman of the governing board of the WTCEO, also state that the total cash funding of the WTCEO was supplied by the Office of Economic Opportunity. Some "in kind" services were provided by others, but no cash was provided (Pet. App. 22a-23a). Mr. Breckenridge further avers that the projects undertaken by the WTCEO were those suggested by the Economic Opportunity Act or the directive of the OEO, and that the Westlawn Neighborhood Opportunity Center was one of such projects (App. 37). Thus, regardless of the potential of the WTCEO to engage in non-OEO projects, the uncontroverted fact is that the WTCEO activity in which Respondent was involved when he was injured was an OEO project.

D. OEO Exercised Day-to-Day Control and Supervision Over Virtually Every Aspect of the Operation of the WTCEO.

The Economic Opportunity Act of 1964, as amended through December 30, 1969, and effective on September 30, 1970, when this accident occurred, provides for *"the creation and funding of 'Community Action Agencies'"* and the carrying out of certain programs by said agencies (42 U.S.C. §§ 2781 and 2790). The Act also provides for the development of "neighborhood centers" by the Community Action Agencies (42 U.S.C. 2811). The Act further creates the Office of Economic Opportunity to be headed by a Director appointed by the President with the advice and consent of the Senate (42 U.S.C. 2941), and to be part of the Executive Office of the President.

The WTCEO is a Community Action Agency funded by OEO, as admitted by Wendell Verduin, Regional Director of OEO, Chicago Region (App. 9). As such, it

is subject to the detailed regulatory and supervisory scheme promulgated by OEO, which scheme permeates virtually every aspect of a CAA's operation. This regulatory scheme was promulgated by means of Community Action Memoranda, OEO Instructions, duly adopted regulations published in the Code of Federal Regulations, the imposition of grant conditions, and direct personal interference. Significantly, Community Action Memo 9(a) of February 21, 1967, promulgated by the national office of OEO, specifically recognizes that "[t]*he principal instrument through which community action programs are carried out is the Community Action Agency.*" (Emphasis added).

Generally, with respect to the degree of control exercised by OEO, the affidavit of Mr. Breckenridge is revealing:

> "The Affiant says that from the time of the organization of the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center, the Warren Council for Economic Opportunity, Inc. and Westlawn Neighborhood Opportunity Center acted as agencies to serve and assist the poor in the methods and manners outlined and prescribed by the Economic Opportunity Act and numerous instructions, restrictions and requirements of the Director of the Office of Economic Opportunity. These instructions and requirements directed the manner in which the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center be organized, the classes of persons who were to be employed as directors or serve as trustees, the nature and purpose of the projects to be undertaken and the methods for carrying out such projects. Before funding was granted, the United States of America,

through the Office of the Director of Economic Opportunity and his regional directors, was required to approve projects and the outlined approach for conducting them. After a project was approved, its operation was supervised by the Office of the Regional Directors in Chicago.

"Without the Economic Opportunity Act and the funds made available thereunder, the Warren Council for Economic Opportunity, Inc. would not have been created and could not have operated or existed." (App. 37-38).

Review of the relevant Community Action Memoranda and the Code of Federal Regulations confirms the statements made by Mr. Breckenridge.

The regulatory scheme promulgated by OEO with respect to each Community Action Agency is contained, in part, in 45 C.F.R., Parts 1067-1070, pp. 218-259 (1974).[2] Without intending to be exhaustive, those regulations provide the following:

Subpart 1067.1 provides for the suspension and termination of assistance for "failure of a recipient to comply with applicable laws, regulations, Community Action Memoranda, standards, issued program guidelines, OEO Instructions, assurances, grant conditions or approved work programs." (p. 219). Moreover, suspension of funding may be made by OEO summarily if an OEO official believes that to be proper (p. 221).

The finances of an OEO grantee are most closely regulated (Subparts 1067.3-1068.4). For example, grantees re-

2. All page references herein are to 45 C.F.R., Parts 1067-1070 (1974), published by the Office of the Federal Register, National Archives and Record Service, General Services Administration.

ceive their funds by means of a Letter of Credit. OEO regulations require that a grantee not withdraw more funds than are necessary for the following thirty days. Otherwise, the Letter of Credit will be revoked by OEO (p. 228). The accounting method to be followed by a CAA is set forth in OEO Instructions 6100-1 and it must be followed (p. 236). All income, including non-federal money, and all costs, including costs not paid for by federal money, must be accounted for and reported to the government (pp. 236-237). All personnel costs must be reported (p. 237).

Administrative costs are closely regulated and may not exceed fifteen percent of the total cost of any grant program, regardless of the source of funds used to pay those costs (p. 237). Further, in the event administrative costs are, in the opinion of the Director, excessive, he may order a CAA to take "specific actions to reduce their administrative costs and improve their operational effectiveness" (p. 237). 42 U.S.C. § 2836 (7) further provides:

". . . In any case in which the Director determines that the cost of administering such programs does not exceed 15 per centum of such total costs but is, in his judgment, excessive, he shall forthwith *require* such community action agency *to take such steps prescribed by him* as will eliminate such excessive administrative cost, including the sharing by one or more such community action agencies of a common director and other administrative personnel. . . ." (Emphasis supplied).

Further, a CAA periodically must file a detailed report concerning *all* of its expenditures (p. 238). A CAA is prohibited from using grant funds to pay interest or other charges incurred to borrow funds without prior permission of OEO (p. 239). (Thus, when a CAA has no funds other

than federal funds, as is the case here, any borrowing is impossible without OEO approval.)

Subpart 1068.5-1 concerns "allowances and reimbursements for members of policy making bodies" and applies by its terms to all members of policy making bodies of organizations receiving financial assistance from OEO, i.e., these proscriptions apply to the use of both federal and non-federal funds. Allowances for attendance at meetings are limited to a maximum of $5.00 per meeting, and meal expenses and travel expenses are to be paid pursuant to the Standardized Government Travel Regulations. The regulations are so comprehensive that even the rate of babysitting expenses ($1.60 per hour) is prescribed, as are other similar costs, such as lunch and dinner expenses (pp. 242-243).

Part 1069 of 45 C.F.R. concerns itself with personnel management. These regulations are extensive and regulate virtually every aspect of a CAA's employment program. For example, the permissible limits of direct action, e.g., demonstrating, etc. are defined and are made applicable to every community action "employee or volunteer" (p. 249). Limitations with respect to unlawful demonstrations, rioting and civil disturbances apply "to all full-time and part-time employees and volunteers engaged in carrying out the program of any organization financially assisted under the Economic Opportunity Act of 1964." i.e., regardless of whether the employee in question is engaged in a program assisted by federal funds or by funds received from other sources (p. 249). A CAA is required to screen out persons who are likely to take place in unlawful demonstrations *and to terminate people who do* (p. 251).

Personnel policies also are controlled by Community Action Memoranda. For example, memorandum No. 23 (attached to the affidavit of Sidney I. Roberts) requires that:

> "Each grantee and delegate *agency must develop and submit to the OEO Regional Office for its approval a formal plan which details the personnel policies* and procedures the grantee will follow with respect to employees supported by OEO funds or cash contributions to the employees supported by OEO funds *or cash contributions to the non-Federal share.*" (Emphasis supplied).

The personnel plan must describe the following, all of which must be approved by OEO:

> "1. *Positions and salaries.* The duties and responsibilities of each job or position in the OEO-financed program and the salary of each position (classification and pay plan). The qualifications to be required of persons occupying each position (work experience, academic preparation, etc.) and the procedures to be used in evaluating applicants (reference checks, interviews, etc.)
>
> 2. *Employee Advancement and performance.* Policies followed with respect to periodic pay raises, promotions, and separations and the criteria used to evaluate employee performance.
>
> 3. *Employee benefits.* Benefits offered, (vacations, sick leave, workmen's compensation, social security, etc.), and the details of the agency and employee contribution to any benefit plans (hospitalization, etc.)
>
> 4. *Employee activities.* Policies governing employee participation in employee groups or unions and a description of the machinery employed to consider employee grievances." (pp. 1-2)

Memorandum 23 also provides that all "salary increases . . . will be subject to review by OEO" (p. 4), prohibits overtime payments for persons earning in excess of $7,000.00 per annum (p. 4), and reserves the right to control CAA participation in employee benefit plans (p. 5).

Travel of all employees employed by CAA is closely regulated by subpart 1069.3. The travel regulations of a CAA may not be less restrictive than the Standardized Government Travel Regulations (pp. 251-252).

Lobbying activities of a CAA are subject to "very sharp limitations" (p. 254), and while the restrictions apply only to "project funds", significantly that term is defined as applying to both federal and matching non-federal shares of approved program budgets, i.e., such restrictions are not applied solely to federal funds (p. 255).

Part 1070, 45 C.F.R., entitled "Community Action Program Grantee Operations" eliminates whatever doubt might exist as to the public agency character of a CAA. This Part requires every CAA to make available "for public inspection and examination" virtually every document in the CAA's possession (pp. 256-257). The regulations set forth the hours when inspection shall be permitted and the documents which may be inspected (p. 257). If an individual CAA does not want to permit inspection of a particular document, it must obtain the written approval of OEO not to do so (p. 257). In addition, all meetings of grantees must be "open to all members of the public" (p. 259), and this requirement "applies to all activities of that agency," i.e., not just federally financed or assisted activities (p. 258). The CAA must permit any member of the public to speak at these meetings (p. 259).

Stringent as the regulatory scheme described above is, it literally pales by comparison with the *actual* control

and supervision exercised by OEO over the WTCEO. The Sixth Circuit relied heavily on actual control and the particular facts of this case when it stated:

> ". . . On the other hand, by withholding approval of its operations, OEO had for all intents and purposes put WTCEO out of business for a period of time and had in October 1972 selected a new chairman of its board who completely reorganized the agency. These are not powers usually possessed by a principal in dealing with an independent contractor."

The District Court also acknowledged, to some extent, the extent of actual control when it held that "the Council conducted no programs other than those formulated and funded by the federal government" (Pet. App. 23a), and that "the Office of Economic Opportunity and its regional office in Chicago exercised close supervision over the Council and its activities" (Pet. App. 23a). The District Court also admitted:

> "The court recognizes that the Office of Economic Opportunity exercises '*very close supervision*' over the general organization of community action agencies and over their financial dealings and Federally funded programs.
>
> "The court even recognizes the fact that *Federal funding was stopped to the Warren-Trumbull Council* until the Council was reorganized and that the *Regional Director of the Office of Economic Opportunity appointed Sidney I. Roberts as chairman of the governing board to implement the reorganization.*" (Pet. App. 26a). (Emphasis added).

Of particular importance in this case are the affidavits of the persons associated with the WTCEO. (Those per-

sons, of course, are not parties in this litigation.) For example, the affidavit of Sidney I. Roberts describes his direct appointment to the chairmanship of the governing board of the WTCEO by the Regional Office of Economic Opportunity:

> "Personally appeared before me SIDNEY I. ROBERTS, who after first being duly sworn and affirmed, says that in October of 1972, he was appointed directly by the Regional Office of the Office of Economic Opportunity to be chairman of the governing board of The Warren-Trumbull Council for Economic Opportunity and that he was asked by the Chicago Regional Office to re-organize the Warren-Trumbull Council for Economic Opportunity." (App. 38).

This assertion is confirmed in the deposition of Lester Peterman, former executive director of the WTCEO, pp. 30-31 thereof.[3]

OEO control over personnel of the WTCEO was emphasized by Mr. Peterman, who testified that Mr. Penzak, an employee of the Regional Office of OEO, discussed with him whether certain hirings and firings had been carried out in accordance with OEO guidelines (Peterman Depo., p. 15). Further, Mrs. Ellen Stanton testified that there existed in her office a "blue book" which set forth "what was expected of us, what days we had off, [etc.]." So far as Mrs. Stanton was aware, that publication came "from Chicago" (Stanton Depo., p. 29).

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3. Petitioner, understandably, wants to ignore this highly important evidence of the fact that the WTCEO is not an independent contractor, and does not mention it until p. 21 of its Brief. But even when Petitioner mentions it, it inaccurately states that funding was cut off by OEO until a new Chairman "had been selected." Mr. Roberts' affidavit states that he was "appointed directly by the Regional Office of the Office of Economic Opportunity to be chairman of the governing board of . . ." (App. 38).

Even Wendell Verduin, the Chicago Regional Director of OEO, admitted that the Regional Office supervises salary limitations, salary increases, and the approval of other personnel actions. Mr. Verduin denied that OEO hires and fires individual persons, but this denial contradicts and flies in the face of the action of OEO with respect to Sidney I. Roberts (Verduin Depo., pp. 30-31). Mr. Verduin also admitted that OEO assures that a CAA has "a wage scale that is comparable to the wage scales of comparable organizations and communities that they serve." (Verduin Depo., p. 32). Further, as shown above, Community Action Memorandum 23 contains numerous instructions with respect to the employment of personnel.

In addition to control over personnel, travel, public access to information, administrative costs, accounting, and audits, significantly the Office of Economic Opportunity also controls and supervises the various programs undertaken by a CAA. For example, Mr. Verduin admitted with respect to the purpose of OEO and its monitoring of grant funds:

> "Q. . . . And the purpose, the whole purpose of the OEO is to get the federal funds spent in such a fashion as to carry out the intent of Congress in the Economic Opportunity Act, isn't that correct?
>
> * * * * *
>
> "The Witness: Well, I am not sure that I would state that that is the whole purpose of OEO, but obviously OEO—
>
> By Mr. Pfau:
>
> "Q. Well, a prime purpose?
>
> "A. Yes.
>
> *"The prime purpose of OEO is to carry out the Economic Opportunity Act as amended.*

"Q. And the Warren-Trumbull Council of Economic Opportunity was one of the agencies appointed or chosen by the Office of Economic Opportunity as a recipient of funds to carry out the purpose of the congressional act, isn't that correct?

"A. It was. The Warren-Trumbull Community Action agency received recognition by OEO to receive funds to carry out programs in that community, programs that it determined necessary to implement.

"Q. Well, the instrument—

"A. In compliance with the Act and its regulations.

"Q. *To implement the purposes of Congress and the Economic Opportunity Act, isn't that correct?*

A. *Yes.*" (Emphasis added).

OEO Instruction 6002-01 gives OEO ultimate control over any program adopted by a CAA, as Mr. Verduin admitted in his deposition (pp. 1-17):

"Q. Well, OEO Instruction 6002-01 provides, does it not, that 'The applicant agency has considerable flexibility in determining what activities it will undertake, the manner in which these activities will be undertaken, and the families and individuals that will be assisted, *subject to the policies in this guide and to such further policies and procedures as may be issued by the Office of Economic Opportunity,' isn't that correct?* (Emphasis added).

"Mr. McGinness: What regulation are you reading from?

"Mr. Pfau: 6002-01. Do you have those there?

"Mr. Ring: It's in there.

By Mr. Pfau:

"Q. I think I have read that verbatim from your report, isn't that correct?

"A. That's correct.

"Q. And that is an instruction that is given to every Community Action agency, is it not?

"A. That's correct.

"Q. And it is binding upon each such agency, isn't that correct?

"A. That's correct.

"Q. *And specifically advises each such agency that in the future the OEO may enact other policies and procedures which will be binding upon that Community Action agency, isn't that correct?*

"A. *That's correct.*" (Emphasis added).

The affidavit of Mr. Breckenridge, a past president and member of the Board of Trustees of the WTCEO, states as follows with respect to specific governmental approval of individual programs and the method of conducting them:

> "Before funding was granted, the United States of America, through the Office of the Director of Economic Opportunity and his regional directors, was required to approve projects and the outlined approach for conducting them. After a project was approved, its operation was supervised by the Office of the Regional Directors in Chicago." (A. 11).

In its brief, Petitioner grossly understates the degree of federal control over the WTCEO when it states that "federal involvement is limited to financial aid, guidance when requested, and overstatement to protect against misapplication of funds." (Pet. Brief, p. 14). In making this statement, one can only assume that Petitioner has ignored the relevant provisions of the Code of Federal Regulations, the Community Action Memoranda, and the so-called "guidelines" promulgated by OEO.

Petitioner also states that "[t]he board [of trustees] itself is free of federal control." (Pet. Brief, p. 14). This

is not accurate. First, the composition of the board must comply with the federal statute, i.e., one-third of the board must be "elected public officials," one-third must be "representative of the poor in the area served," and one-third must be representative of "major groups and interests in the community." (42 U.S.C. § 2791(b)). Second, the statute requires that the total membership of the board may not exceed 51 persons, and that no person (other than a public official) may serve on a board for more than three consecutive years or more than a total of six years. Finally, OEO, in this case controlled the board in the most direct and meaningful way possible, i.e., it removed the chairman and "appointed directly" his successor. It is submitted that such controls are inconsistent with an independent contractor relationship.

The above summary of the actual and potential control and day-to-day supervision of virtually every activity of the WTCEO perhaps is unduly lengthy. However, it is necessary in this instance because Petitioner chooses to ignore all of these facts in its one and one-half page affidavit in support of its motion for summary judgment, and chooses to ignore the Code of Federal Regulations, the affidavits of Messrs. Roberts, Breckenridge, and McLain, and the memoranda and guidelines promulgated by OEO. The facts contained in the depositions and affidavits submitted by Respondents, together with the Regulations, Memoranda and Instructions promulgated by OEO, contradict the summary conclusions of Petitioner's affidavit and demonstrate that the WTCEO in fact is operating as a "corporation primarily acting as [an] instrumentalit[y] or agenc[y] of the United States" as that phrase has been defined by decided court cases, as will be shown below. In any event, it is submitted that the aforementioned material clearly offsets the single affidavit of Petitioner and demonstrates that there is a "genuine issue of material fact"

(Rule 56, FRCP) as to whether the WTCEO is a "federal agency" as defined in the Federal Tort Claims Act (28 U.S.C. § 2671).

SUMMARY OF ARGUMENT

The Federal Tort Claims Act defines a "federal agency" as being, inter alia, "corporations primarily acting as instrumentalities or agencies of the United States . . ." (28 U.S.C. § 2671). The Warren-Trumbull Council for Economic Opportunity, Inc. was organized and its Articles of Incorporation as a non-profit corporation were tailored, for the specific purpose of becoming a Community Action Agency of the Office of Economic Opportunity pursuant to the Economic Opportunity Act of 1964.

As a condition of becoming a Community Action Agency and receiving federal funds, the WTCEO became obligated to comply with a myriad of regulations (both then adopted and any thereafter adopted) which related to virtually every aspect of both its long-range and its day-to-day activities, including personnel activities. The bulk of these regulations applied, by their terms, to all agency activities, both federally funded and privately funded (of which there were none in the case of the WTCEO).

In fact, OEO did exercise very close supervision and control in the case of this Community Action Agency. Most startling of all, it removed the duly elected chairman of the board of trustees and "directly appointed" another person to that position with orders to "re-organize" the WTCEO. The voluminous regulations and the specific acts of OEO, *in this case*, belie any notion that the WTCEO was an independent contractor.

The Federal Tort Claims Act is entitled to be given a liberal interpretation, particularly where, as here, the Respondent is a "client" or beneficiary of the Economic Opportunity Act of 1964.

Decided cases hold that in the determination of whether the WTCEO is a "federal agency" or a "contractor with the United States" *the facts of each particular case control.* Thus, it is the actuality of control and the retention of the right to control the day-to-day activities of the WTCEO which control this litigation. When so viewed, it becomes apparent that the exercise of control over the activities of the WTCEO by OEO, and the OEO requirements concerning the corporate structure of the WTCEO, are inconsistent with the legal definition of independent contractor. Consequently, the Court of Appeals properly reversed the granting of summary judgment to Petitioner by the District Court and remanded the case to that Court for "further proceedings consistent with [its] opinion."

ARGUMENT

A. The Economic Opportunity Act of 1964 Made It the Policy of the Federal Government to Eliminate Poverty and This Policy Was Implemented by Means of Community Action Agencies.

The Economic Opportunity Act of 1964 was intended by the President and the Congress to serve as a cornerstone of the war on poverty. This intention was stated clearly in the first section of the Act (42 U.S.C. §§ 2701-2995d):

> "Although the economic well-being and prosperity of the United States have progressed to a level surpassing any achieved in world history, and although these benefits are widely shared throughout the Nation, poverty continues to be the lot of a substantial number of our people.
>
> * * * * *
>
> "It is, therefore, the policy of the United States to eliminate the paradox of poverty in the midst of plenty in this Nation by opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity. It is the purpose of this chapter to strengthen, supplement, and coordinate efforts in furtherance of that policy."

An important element of the Act is Title II thereof, the Community Action Program. In 1965, shortly after the adoption of the Act, the Warren Council for Economic Opportunity, Inc., the predecessor to WTCEO, was organized:

> "[F]or the purpose of obtaining funds made available through the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the United States by carrying out the purposes of an Economic Opportunity Act. The corporation was carefully organized and the bylaws and regulations tailored to come within the restrictions of the Economic Opportunity Act." (Affidavit of John Breckenridge, App. 36).

Prior to the Economic Opportunity Act of 1964, the federal government administered programs of this nature directly from Washington, D.C. Testimony before Congress indicated that this approach treated only the visible manifestations of poverty but did not get to its symptoms. Consequently, Congress determined to use a more widespread and localized approach in the war on poverty. As stated in the House Report (1964 U.S. Code Congressional

and Administrative News, Volume 2, p. 2910) which accompanied the Economic Opportunity Act:

> "Testimony before the committee has indicated that this kind of wide-ranging participation is essential in getting at the root causes of poverty in the community."

The House Report also was quite specific with respect to the kinds of programs to be undertaken by a Community Action Agency:

> "Because poverty has many interrelated causes, financial assistance under title II will be made available to organizations to assist in the development and operation of action programs which are of sufficient size and scope to show promise of concrete progress toward the elimination of poverty and a cause or causes of poverty."

B. The Federal Tort Claims Act Should Be Liberally Construed in Order to Accomplish Its Purpose of Extending Protection to the Public.

The Federal Tort Claims Act, 28 U.S.C. § 1346(b), provides that the United States shall be liable for torts of "employees of the Government" in a manner identical to private persons. Specifically, 28 U.S.C. § 1346(b) provides:

> "(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court for the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. § 2671 defines the phrase "employee of the Government," and the phrase "federal agency":

> "§2671. Definitions
>
> "As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—
>
> " 'Federal agency' includes the executive departments and independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.
>
> " 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.
>
> " 'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Respondents contend that the WTCEO is a "federal agency" because it was a "corporation primarily acting as [an] instrumentalit[y] or agenc[y] of the United States" when it undertook the Westlawn Neighborhood Opportunity Center, the activity in question here. Consequently, the employees of the WTCEO conducting the outing on September 3, 1970, were "employees of the Government". Thus, the United States is liable for their negli-

gence. As the Court of Appeals held, this is particularly true where, as here, the party injured as a result of such negligence is a "client" of the Community Action Agency. That is, "special considerations flow from the peculiar federal responsibility for the safety and wellbeing of persons drawn into the programs of OEO." (Pet. App. 16a).

Many cases have held that the Federal Tort Claims Act should be given a liberal construction, and that the definition of "employee of the Government" should have an expansive reach.[4]

For example, in *Witt v. United States,* 462 F.2d 1261, 1263 (2nd Cir. 1972), the Court stated:

> "This definition [of "employees of the government"] is not without boundaries . . . but quite clearly the statutory language was drafted to have an expansive reach . . ."

Also, see *City of Pittsburgh v. United States,* 359 F.2d 564, 567 (3d Cir. 1966); *Pittman v. United States,* 341 F.2d 739, 741 (9th Cir. 1965), *cert. denied* 382 U.S. 941 (1965); *United States v. Alexander,* 238 F.2d 314, 317 (5th Cir. 1956); *O'Toole v. United States,* 206 F.2d 912, 918 (3d Cir. 1953); *Somerset Seafood Co. v. United States,* 193 F.2d 631, 634 (4th Cir. 1951); *Merchants Nat'l Bank & Trust Co. of Fargo v. United States,* 272 F. Supp. 409, 417-418 (D. N.D. 1967); *Gilroy v. United States,* 112 F. Supp. 664, 666 (D. D.C. 1953); *Rushford v. United States,* 92 F. Supp. 874, 875 (N.D. N.Y. 1950), *aff'd* 204 F.2d 831 (2d Cir. 1953).

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4. As to the phrase "corporations primarily acting as instrumentalities or agencies of the United States," some of the bills introduced during the first period of legislative reform exclude from suit Government corporations unless the Government owns 51% or more of the shares of the voting stock of such corporations. See, e.g., H. R. REP. No. 286, 70th Cong., 1st Sess. (1928) 6, 7; Print of S. 4377, 71st Cong., 2d Sess. (1930) §301; H. R. REP. No. 667, 69th Cong., 1st Sess. (1926) 6, 7; H. R. REP. No. 2800, 71st Cong., 3d Sess. (1931) 12. The requirement is not contained in the Act, as adopted.

A liberal approach is particularly apropos in the instant case. A Community Action Agency, by virtue of Congressional mandate, consists of persons who are living in poverty. Such an organization is very unlikely to have financial resources adequate to compensate persons damaged by the negligence of their employees. Thus, unless the Federal Tort Claims Act applies, innocent victims, such as Joseph Orleans, will not be compensated, albeit the tortfeasor was engaged in a governmental activity, implementing the federal government's war on poverty, when the tort occurred and the party injured was a "client" of the Agency. The Court of Appeals so held:

> "Both the Federal Tort Claims Act and the Economic Opportunity Act of 1964 were designed to remedy conditions which caused hardship and human suffering. Before the passage of the Tort Claims Act, a person injured as the result of negligence of an employee of the government was denied a remedy which was available to another whose injuries were caused under similar circumstances by the negligence of a private individual or the employee of a private firm. Elimination of this disparity which was based on the outmoded legal fiction that 'the king can do no wrong' achieved a laudable humanitarian result. Congress embarked on another humanitarian effort of monumental proportions when it undertook, with the passage of the 1964 Act, a program for the eventual elimination of poverty in this Nation.
>
> "*When the two Acts here involved are read together and consideration is given to the purpose of each, it does not appear that Congress intended to shield the government from liability in a situation such as this case presents.* The scheme of the 1964 Act is to improve the lot of the poor by involving

them in a multitude of activities which their poverty had previously prevented them from experiencing. To the extent that participation in these activities exposes the beneficiaries of the Act to injury while engaged in approved programs under the supervision of personnel of a community action agency, the United States cannot avoid liability under the Federal Tort Claims Act on the ground that agencies chosen to achieve the purposes of the 1964 Act are not federal agencies or instrumentalities. To equate the status of such an agency with that of independent contractor under these circumstances would be to elevate form above substance." (Emphasis added).

C. The Determination of What Entities Are Federal Agencies Is a Pragmatic One Based on the Activities of the Entity's Operations.

An important part of the definition of "federal agency" is the phrase "*acting primarily* as instrumentalities or agencies . . ." (Emphasis added). This phrase, as courts have recognized, indicates that the determination of which entities are "federal agencies" depends upon "the facts and circumstances of each individual case." (Annotation, "Who Is an 'Employee of the Government' for those whose conduct the United States May be Held Liable Under the Federal Tort Claims Act—Federal Cases," 14 L. Ed. 2d 892, 901.)

It is a pragmatic test, based on "actualities." (See, for example, *Schetter v. Housing Authority of the City of Erie,* 132 F. Supp. 149 (W.D. Pa. 1955).) The determination depends not on whether a particular entity had power to act as other than an instrumentality or agency of the United States, but whether in fact it was doing so at the time the tort occurred. Thus, one must look at the

control being exercised, the supervision which existed, the regulations promulgated, the source of funding, and the reservation of the right to control and supervise rather than to whether the entity might have operated differently than it did.

In this Supreme Court's most recent consideration of the Federal Tort Claims Act, *Logue v. United States,* 412 U.S. 521, 526-527 (1973), such a pragmatic standard was specifically endorsed:

> "We read that portion of the Court of Appeals' opinion quoted *supra* as treating the 'contractor' exemption from the definition of 'Federal agency' in § 2671 as adopting the common-law distinction between the liability of an employer for the negligent acts of his own employees and his liability for the employees of a party with whom he contracts for a specified performance. Both the modern common law as reflected in the Restatement of Agency and the law of Texas makes the distinction between the servant or agent relationship and that of independent contractor *turn on the absence of authority in the principal to control the physical conduct of the contractor in performance of the contract.*" (Emphasis added).

The Supreme Court added:

> ". . . The courts of appeals that have had occasion to decide the question appear to have unvaryingly held that the 'contractor with the United States' language of §2671 adopts the traditional distinction between employees of the principal and employees of an independent contractor with the principal, and to have also held that the critical factor in making this determination is the *authority of the principal to control detailed physical performance of the contractor. . . .*" (Emphasis added).

Quoted with approval in *Logue* was the RESTATEMENT (SECOND) OF AGENCY § 2 (1958):

> "(1) A master is a principal who employs an agent to perform service in his affairs and who controls *or has the right to control* the physical conduct of the other in the performance of the service.
>
> "(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled *or is subject to the right to control by the master.*
>
> "(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent." (Emphasis added).

Logue, of course, held that on the facts of that case, a local jail was not a federal agency. But the degree of supervision and control was materially different in *Logue v. United States, supra,* than in the instant case. In *Logue,* the United States entered into a formal contract, limited by its terms, with a local jail for the short-term housing of federal prisoners. This Court found that in its formal contract the United States limited its role "to the payment of sufficiently high rates to induce the contractor to do a good job" and to "the right to enter the institution . . . at reasonable hours for the purpose of inspecting the same and determining the conditions under which the federal officials are housed" (412 U.S. at 530 and 531). Moreover, the opinion in *Logue* does not indicate what actions the federal government actually took.

In the instant case, a formal contract limiting the rights of OEO and the duties of WTCEO was not executed.

Rather, the WTCEO, when it assumed the status of a Community Action Agency, obligated itself to abide by all regulations, memoranda, guidelines, etc. of OEO, *then existing or thereafter adopted.* Thus, the power of OEO to control the WTCEO was not delimited, but was open-ended. Thus, the WTCEO in the words of RESTATEMENT (SECOND) OF AGENCY § 2, was "subject to the right to control" by OEO. Moreover, as outlined above, OEO did exercise actual control in a manner inconsistent with the traditional principal-independent contractor relationship.

Inquiry should be focused upon not what could have happened, but what in fact happened. 28 U.S.C. § 2671 uses the phrase "acting primarily," thereby indicating both that the actual state of affairs governs and that an entity need not be *exclusively* an instrumentality of the government.

Logue supports the proposition that what actually happened in each particular case controls the determination of whether a corporation is "primarily acting as [an] instrumentalit[y] or agenc[y] of the United States." In footnote 8 of 412 U.S. at 532, this Court notes that two Court of Appeals decisions involving federal prisoners in local jails reached different results. This Court did not say that those cases were wrongly decided. On the contrary, it stated that those cases "involved findings of control by the Government that are contrary to the determination of the Court of Appeals in this case."

Likewise, Petitioner makes much of the fact that other courts have reached a result different from the Sixth Circuit in this case. That fact, standing alone, means little. To Respondents' knowledge, those other cases did not present such strong evidence of actual federal control over the Community Action Agencies. Certainly, those cases did not reveal that, as here, OEO removed the chairman

of the board of trustees and "appointed directly" his successor (App. 38).

Thus, when actual control and the reservation of future control by OEO of the WTCEO is analyzed, it is clear that the WTCEO is a "federal agency." It was organized solely for the purpose of receiving federal funds and carrying out federally sponsored programs (App. 31 and 36); it received cash funds only from the federal government (App. 36 and 39); it implemented only federal programs (App. 37); and it was regulated closely by OEO as to its day-to-day operations (App. 37), e.g., admission to meetings, access to documents and personnel policies (including the appointment of the chairman of the Board of Trustees).

D. OEO Exercised Control and Reserved an Unlimited Right to Control the WTCEO, an Entity Engaged in Implementing Governmental Policy. In These Circumstances Logic and Precedent Compel the Conclusion That the WTCEO Was an Instrumentality or Agency of the United States.

OEO, by means of its promulgated "regulations, Community Action Memoranda, standards, issued program guidelines, OEO Instructions, assurances [and] grant conditions" (45 C.F.R. § 1067.1-1(a)), reserves the right to regulate and supervise a Community Action Agency in virtually any manner OEO deems wise. (This reservation of authority also was admitted by Mr. Verduin (Depo., p. 17, *supra*, p. 16). See also, 42 U.S.C. § 2796(b), 42 U.S.C. § 2790(a), and OEO Instruction 6002-01, in which OEO specifically retained the right to adopt "such further policies and procedures as may be issued by the Office of Economic Opportunity.") Further, as was shown above, it was the intention of Congress that the CAA be a principal instrument in the war on poverty (42 U.S.C.

§ 2791). That is, the CAA was an essential element of the implementation of a federal governmental program. When a CAA, such as the WTCEO, acts in furtherance of the implementation of this federal governmental program, when it is closely regulated by OEO in doing so, and when such regulation is subject to undefined expansion, then such a CAA comes within the definition of a "federal agency" contained in 28 U.S.C. § 2671.

The decisions reflect considerable flexibility in defining the phrase "federal agency," and in defining when a corporation is "primarily acting" as an "instrumentalit[y] or agenc[y] of the United States." No one factor is determinative. Rather, it is the amalgamation of all aspects of the entity's actual operation, and the control thereof by the federal government, which determines the issue. For example, in *Duba v. Schuetzle*, 303 F.2d 570 (8th Cir. 1962), the court held that a local county committee of a state agricultural committee (which was appointed by the Secretary of Agriculture) was a federal agency, notwithstanding that the county committee members were selected by cooperating farmers within the county and that the regulations under which the county committee was created provided that such county committee "shall be generally responsible for carrying out in the county the agricultural conservation program . . ." The court found that the County Committee was subject to the "general direction and supervision" of the state committee, and that this was enough to give it the status of a governmental agency. The court found that it did not have jurisdiction of the case for reasons not relevant here, but it did state that the county committee constituted a "governmental agency."

Similarly, in *Delgado v. Akins*, 236 F. Supp. 202 (D. Ariz. 1964), the court held that an employee of an identical

county committee was an "employee of the Government" pursuant to 28 U.S.C. § 2671. The court acknowledged that the employees were hired by the county committee, that the government exercised "no direct control over the withdrawals" over county committee funds, and that "the work of the field reporter, Mr. Akins, was under the County Committee." Nonetheless, because the committee was subject to audit from Washington, D.C. and because numerous bulletins, hand books, and regulations establishing standards of conduct were promulgated by the federal government, the court held that Akins was an "employee of the Government."

Thus, these cases stand for the propositions that one can be an "employee of the Government" notwithstanding that there is local control of the hiring process, that salaries are paid on non-government checks, that the federal government exercises no direct control over disbursements of funds, and that details of implementing federal programs are left to local discretion.

Martarano v. United States, 231 F. Supp. 805 (D. Nev. 1964), held that one hired and paid by the State of Nevada, and whose retirement plan and industrial compensation were provided for through state agencies, nonetheless was an "employee of the [federal] Government" because his temporary work assignment placed him under the supervision of the Fish and Wildlife Service of the Department of the Interior. The Court stated:

> "The Government argues that Sweeney was an employee of the State of Nevada and not of the United States because he was hired by the State Personnel Department, was paid by the State, and received all fringe benefits of employment through state agencies. We do not agree. In respect of the vicarious liability

> of a master for the tortious misconduct of his servant, the controlling principle is that responsibility follows the right of supervision and control.
>
> "Courts have held that the fact of compensation by the United States or the use of a government vehicle does not in itself qualify a person as an employee of the Government. Fries v. United States, supra; Harris v. Boreham, (3 CCA 1956) 233 F.2d 110. The converse is true in our case. The fact that Sweeney was compensated as an employee by the State of Nevada does not disqualify him from status as an employee of the Government at the time of the collision."

Significantly, the court stated that it was the "right of supervision and control" which was critical to its decision. In the instant case, there is no question but that the OEO regional office had the *right* of supervision and control. Its regulations, 45 C.F.R., Parts 1067-1070, so provide, and it was admitted by the Chicago Regional Director (Verduin Depo., p. 17). Moreover, OEO exercised that right in the most meaningful way possible, it directed who was to be Chairman of the Board of Trustees of the WTCEO.

The significance of the *potential* ability of the federal government to control was emphasized in *Witt v. United States*, 462 F.2d 1261 (2d Cir. 1972). There, the court held that one McQuirk was acting as an employee of the United States Disciplinary Barracks when he picked up prisoners and transported them in his trailer to the Fort Leavenworth Hunt Club for a "volunteer" work detail. McQuirk had no previous relationship to the Barracks whatsoever. In fact, he had been employed by one Harrison, who in turn had been employed by the Hunt Club, which was not a federal agency. The court stated:

> "Here, although no written agreement existed, McQuirk was *impliedly authorized* by the Commandant of the Disciplinary Barracks to transport prisoners in his custody to a work detail (for which, as will be seen below, prisoners received credit), to supervise or help supervise that detail and to return the prisoners. Moreover, McQuirk was certainly amenable to some degree of control by the Disciplinary Barracks. In such circumstances, McQuirk was 'acting on behalf of a federal agency in an official capacity, temporarily . . . in the service of the United States . . . without compensation.'" (Emphasis added).

Again, the critical point was that the federal government had *power* to control, and thus the entity was a federal agency regardless of whether control actually had been exercised. In the instant case, the Code of Federal Regulations, the OEO Instructions, the Community Action Memoranda, etc. make manifest the extent of both actual, and reservation of potential, control of a CAA by OEO.

Other cases have held that an entity may be a federal agency even though it does not receive any governmental appropriation or funds. For example, in *United States v. Holcombe*, 277 F.2d 143 (4th Cir. 1960), an officers' mess at a naval base which employed civilians and received no funds whatsoever from the federal government was held to be a "federal agency" and its employees to be "employees of the Government." (In the Navy, officers who choose to do so pool their food allowances in the officers' mess. These meal allowances are the only source of funds for the operation of the mess.) Critical to the holding was the court's determination that the officers' mess was "a governmental activity." Similarly, in the instant case, the WTCEO was performing a governmental function, i.e., it was an important vehicle for implementing

the government's war on poverty. Just as an officers' mess is a principal means for feeding officers, so also the WTCEO was a principal means of implementing a governmental policy to eliminate poverty.

An important case is *State of Maryland v. Manor Real Estate and Trust Co., et al.*, 176 F.2d 414 (4th Cir. 1949). The United States leased certain housing units from a private corporation and thereafter engaged an independent real estate firm (Dugan) "to manage the premises, and [he] remained in charge from 1943 to 1947 . . ." (p. 415). During this period, the housing units became infested with rats. The plaintiff's husband was bitten by a rat and died. Just as in the instant case, the United States claimed that Dugan was an independent contractor and hence the death was not caused by the negligent act or omission of any "employee of the Government." The court rejected this contention:

> ". . . It is said that Dugan was in complete charge of the management of the property as an independent contractor and hence Anderson's death was not caused by the negligent act or omission of any employee of the government. There is no substance in this contention because the evidence shows that Dugan was subject to the detailed supervision of the Public Housing Authority, and that in his contract for the management of the property he agreed to be bound by the regulations issued by the government in the form of a contract managers' manual, *and by all amendments thereto.*" (Emphasis supplied).

A similar case is *Schetter v. Housing Authority of the City of Erie*, 132 F. Supp. 149 (W.D. Pa. 1955), where the court held that the Housing Authority of the City of Erie was a federal agency by virtue of a lease agreement it entered into with the United States for the operation of

a housing project owned by the federal government. The lease agreement provided, inter alia, that Erie's budget was to be submitted to the United States, Erie was to provide all personnel, supplies and services to "properly manage, operate, maintain and administer the project" (p. 151), and Erie was to maintain complete records which could be audited by federal officials. The lease agreement contained other terms found in virtually every lease agreement of large tracts of land, e.g., the prohibition of an assignment of mortgage by Erie, surrender of the premises to the United States in good condition upon termination of the agreement, and the right of the United States to sell any part of the project without the consent of Erie. The court held:

> "In view of the foregoing provisions of the lease, justice requires the piercing of the veil which shrouds the relationship between Erie and the United States. The mere fact that the Public Housing Administration, an arm of the United States, delegated its authority to Erie in lieu of acting directly under the attempted form of a lease, does not change or permit the evasion of responsibility.
>
> "Although the contract seeks to relieve the government of tort liability by identifying Erie as a lessee and an independent contractor, nevertheless this court must be guided by the actualities of the relationship which exists.
>
> "Under all facts and circumstances, I must conclude that Erie is not an independent contractor since Erie was controlled by the United States with respect to the performance of the undertaking provided by the agreement between the United States and Erie. Restatement of Agency, Section 2(3); Pennsylvania Railroad Co. v. Allegheny County, 324 Pa. 216, 188 A. 178.
>
> "In view of the terms of the instrument in question, I am compelled to find that Erie was an *instrumentality* of the United States, and that the United States is a proper defendant to the instant proceeding."

See also, *Toth v. United States*, 107 F. Supp. 37 (N.D. Ohio 1952), another housing case, where under a similar lease agreement, the lessee was held to be a federal agency. An important factor in the court's decision was its belief that the lease agreement was intended "to effectuate federal housing policies" (p. 38). An entity which did so, when it also was subject to control and supervision by the federal government, was a federal agency.

These cases demonstrate that it is "the actualities of the relationship" which determine whether or not an entity is a federal agency, particularly where the entity is carrying out a governmental function. Moreover, the cases hold that the United States will be bound by its *actions*, i.e., it cannot unilaterally decide whether an entity is to be a federal agency. Finally, they demonstrate that even a public body, the City of Erie, can be a federal agency in appropriate circumstances.

In the instant case, Petitioner bases its argument on the notion that Congress intended the WTCEO to be an independent organization, and consequently, regardless of what regulations and instructions were issued by OEO officials and regardless of what actions they took, the WTCEO must be considered an independent contractor rather than a "corporation primarily acting as an instrumentalit[y] or agenc[y] of the United States." To this end, Petitioner cites general policy statements from the

Economic Opportunity Act, but ignores other statutory provisions, the pervasive regulatory scheme and actual events.

Schetter and *Logue* demonstrate the error of Petitioner's argument. It is the government's actions, the extent of governmental control and the extent of the reservation of potential control by the government, which determine whether an entity is a federal agency. Consequently, it is highly relevant that the WTCEO did not receive any funds but federal funds and did not undertake any programs but OEO sponsored programs. OEO asserts that it does not control hiring and firing within a CAA. However, the scope of OEO's personnel guidelines, its "suggested" wage scales, and its direct replacement of the chairman of the Board of Trustees with an OEO man, all belie these assertions and compel the conclusion that OEO had direct involvement in personnel policy, at least on the facts of this case and as to the WTCEO. This conclusion is buttressed by the regulations which permit OEO to control the WTCEO in virtually any manner it desires. Further, the WTCEO is given a "public agency" character by the regulatory provisions which require it to open its files to any member of the public and to permit any member of the public to attend and to speak at its meetings.

CONCLUSION

The facts establish that the WTCEO was entirely funded by federal funds, that the government expressed its unlimited right to control, that the government exercised detailed control and that the agency's activities were limited to the implementation of programs expressly designated by Congress and the OEO. Under these facts the WTCEO, in operating its Neighborhood Opportunity Center, was an agency or an instrumentality of the United States.

For the foregoing reasons, it is respectfully submitted that the decision of the Sixth Circuit Court of Appeals should be affirmed and this case should be remanded to the District Court for a trial on the merits on this issue and on all other relevant issues.

Respectfully submitted,

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REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

This brief is filed in reply to respondents' contentions (1) that the federal government possessed and exercised the right of supervision and control of the day-to-day activities of the Warren-Trumbull Council for Economic Opportunity (the Council) and (2) that the decision below is supported by several other decisions of the lower federal courts.

1. As we pointed out in our opening brief (at 11-15), community action agencies are local entities that receive federal assistance to carry out locally chosen and locally controlled programs; they are federal grantees that, by statute, are entitled to substantial autonomy and freedom from governmental control. See, *e.g.*, 42 U.S.C. 2781(a), 2791(b), 2796, 2808(e), and 2835. By virtue of their status as grantees, their use of federal funds and conduct of activities are by nature even further removed from day-to-day federal supervision and control than the work of independent contractors with the government, whose federally assigned tasks are closely defined by contractual terms. Since the

employees of such contractors are not employees of the United States for purposes of the Federal Tort Claims Act (see *Logue* v. *United States*, 412 U.S. 521), it would seem, *a fortiori*, that the employees of federal grantees are not either.

Respondents in effect contend, however, that community action agencies such as the Council are not true grantees but rather are federal instrumentalities, subject to close day-to-day federal supervision and control.[1] This contention is incorrect as a matter of law.

Respondents' case rests upon the following assertions: that the operations of community action agencies are subject to federal regulation (Resp. Br. 31-32); that the Council was organized to receive federal funds and carry out federal programs and received funds only from the federal government (Resp. Br. 32); and that the federal government sets personnel policy for community action agencies and, in particular, removed the chairman of the Council's governing board and appointed his successor (Resp. Br. 31-32, 40). Upon examination, these assertions, to the extent accurate, fail to support respondents' claim of day-to-day federal supervision and control.

a. That the operations of community action agencies are subject to federal regulation simply reflects their status as grantees of federal funds. When providing financial assistance through grants, the federal government seeks to assure that the public monies granted will be expended in a manner that promotes the ends for which they were

[1]In so contending, respondents concede (Resp. Br. 35) that the question whether an individual is a federal employee for purposes of the Federal Tort Claims Act turns upon whether the federal government possessed the right to supervise and control that individual's daily work, *i.e.*, whether, as this Court stated in *Logue* v. *United States*, *supra*, 412 U.S. at 528, the government controlled "the detailed physical performance" of the work.

given. Detailed regulation of the purposes for which funds may be used, including limits on salaries, non-discrimination policies, descriptions of the types of property that can or cannot be purchased, and so forth, is a normal and desirable part of a federal grant program, as is the monitoring of grant projects. For example, detailed regulations govern grants to and contracts with educational institutions. See 45 C.F.R. 100a.10 to 100a.496. It is therefore not surprising that similar regulations pertain to federal assistance to community action agencies. See 45 C.F.R. Parts 1067-1070. But these regulations, which set forth rules pertaining to, *inter alia*, fiscal integrity (see Resp. Br. 10-12, 13-14), participation by employees in unlawful demonstrations (Resp. Br. 12), lobbying activities (Resp. Br. 14), and inspection of records (*ibid.*), fall far short of day-to-day governance of the detailed physical performance of the community action agency's programs and activities. Just as educational institutions do not become federal instrumentalities merely by virtue of receiving federal aid, by the same token, making federal funding of community action agencies contingent upon their compliance with federal regulations does not transmute such agencies into federal instrumentalities, or their employees into federal employees. See *Maryland* v. *United States*, 381 U.S. 41.

b. That the Council was organized to receive federal funds is irrelevant to the question at issue in this case. As we noted in our opening brief (at 19), "the simple fact that the City of Warren and the County of Trumbull desired their citizens to receive the benefit of available federal money does not suffice to turn the entity they organized into an instrumentality or agency of the United States." Nor is it relevant that the Council, although authorized to receive funds from other sources, in fact was dependent entirely upon the United States for financial support. *Maryland* v. *United States*, *supra*.

Furthermore, it does not advance understanding of the relationship between the Council and the United States to point out that the Council was organized to carry out federal programs. Congress, in furthering a federal policy, may "offer financial support to those public or private agencies that are already doing, or that propose to do, what it deems to be in the national interest and thereby help them to initiate or to expand or improve such activities." Willcox, *The Function and Nature of Grants,* 22 Admin. L. Rev. 125, 126 (1970). That is how Congress chose to proceed with regard to community action programs. That the Council proposed to carry out such programs was simply a condition on eligibility for federal assistance; it does not establish federal control of the performance of those programs.

c. Respondents' claim of "direct [federal] involvement in personnel policy" (Resp. Br. 40) apparently rests upon the federal regulations barring participation by employees of community action agencies in unlawful demonstrations (Resp. Br. 12) and requiring approval of hiring, promotion, salary, benefits, and grievance *policies* (Resp. Br. 13-14). These regulations are, however, for the most part designed to ensure that federal funds will be spent properly, for the benefit of the poor rather than of the employees, and not for unlawful purposes. They do not entail supervision of the employees' performance of their responsibilities or control of program activities.

Respondents' assertion that the federal government removed the Council's chairman and appointed his successor is legally incorrect. The federal government has no power to remove or appoint members of a community action agency's governing board. See 42 U.S.C. 2791. As the district court noted (Pet. App. B, p. 26a), the federal government's power is simply that of the purse, to grant or withhold funds:

> While the Office of Economic Opportunity has the power to cut off Federal funds if the council fails to meet federal standards, they [*sic*] have no power to cut off funds from other sources which the council is encouraged to utilize * * *.[2]

The federal government possesses the same power with respect to independent contractors whose principal source of business is the federal government. That power to grant or withhold patronage does not convert the independent contractor, or a federal grantee, into a federal instrumentality.

In short, respondents' effort to show that the federal government "exercised day-to-day control and supervision * * * of the operation of the [Council]" (Resp. Br. 8) establishes only that federal regulations and directives determined the form of organization and the general type of projects that could be funded and that the use of grant funds was prudently monitored. There is no showing, or even allegation, that federal officers suggested or required the trip on which respondent Joseph Orleans was injured or in any way approved the actions of Westlawn Neighborhood Opportunity Center in permitting him to ride in a car driven by another minor (see our opening brief, at 5-6). Lacking such day-to-day supervision and control of the detailed physical performance of the work of the Council's employees, the United States cannot be held liable for their torts.

2. The decisions of other lower federal courts relied upon by respondents (Resp. Br. 33-39) do not support the decision below.

In *Duba* v. *Schuetzle,* 303 F. 2d 570 (C.A. 8), the court of appeals held that the Secretary of Agriculture, by statute

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[2]The affidavit asserting federal removal and appointment of the Council's chairman, upon which respondents rely (Resp. Br. 15-16), reaches an erroneous legal conclusion in describing the effect of a federal threat to withhold funding.

and regulation, administers Agricultural Stabilization and Conservation Committees and that the members of local committees, who are appointed by the pertinent state committee, have no standing to object to a change in location of committee offices. In *Delgado* v. *Akins*, 236 F. Supp. 202 (D. Ariz.), the district court held that an employee of such a local committee is a federal employee for purposes of the Tort Claims Act, emphasizing the direct hierarchical control found in *Duba*. Such control is lacking here. In *United States* v. *Holcombe*, 277 F. 2d 143 (C.A. 4), the question was the United States' liability for the tort of an employee of an officers' mess at a naval base. The United States admitted that officers' messes are " 'an integral part of the Navy establishment, and, as such, are instrumentalities of the Government' " (277 F. 2d at 145), but in denying liability relied on the fact that the employee's salary was paid with earnings of the mess, not federal funds. The court, noting the government's admission and the fact that the mess apparently had contractual authority to bind the United States for its debts, held that mess employees are federal employees. No similar integral relationship or contracting power is at issue here.

Other cases relied upon by respondents involve the negligence of persons temporarily acting as federal employees. Thus in *Witt* v. *United States*, 462 F. 2d 1261 (C.A. 2), a person having custody of federal prisoners while they cleaned out the Fort Leavenworth Hunt Club stables was held to be a temporary federal employee, making the government liable for his tort. Similarly, in *Martarano* v. *United States*, 231 F. Supp. 805 (D. Nev.), the court held that a Nevada wildlife employee engaged in a federal wildlife service project was a federal employee for purposes of the Tort Claims Act. The contract with Nevada expressly provided that " 'all operations * * * shall be under the direct supervision of the [federal] Service' " (*id.* at 807) and the court found that

throughout his employment on this project the employee had been "supervised by federal officials" (*ibid.*). There is no similar provision for federal supervision of community action agencies.

The housing cases relied upon by respondents, *Schetter* v. *Housing Authority of the City of Erie*, 132 F. Supp. 149 (W.D. Pa.), *Maryland* v. *Manor Real Estate & Trust Co*, 176 F. 2d 414 (C.A. 4), and *Toth* v. *United States*, 107 F. Supp. 37 (N.D. Ohio), are equally undeterminative of the present case. Each involved a federal housing project leased for the purpose of management to a private firm. The court in each case held that the lessee-manager was in fact a federal manager and not a true lessee and that, consequently, the United States was liable for its torts. The proprietary interest of the United States and, in at least one case (*Manor Real Estate*), the independent negligence of federal officials, distinguishes those cases.

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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